TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. [redacted]32.

ALEXANDER MILLER, PLAINTIFF IN ERROR,

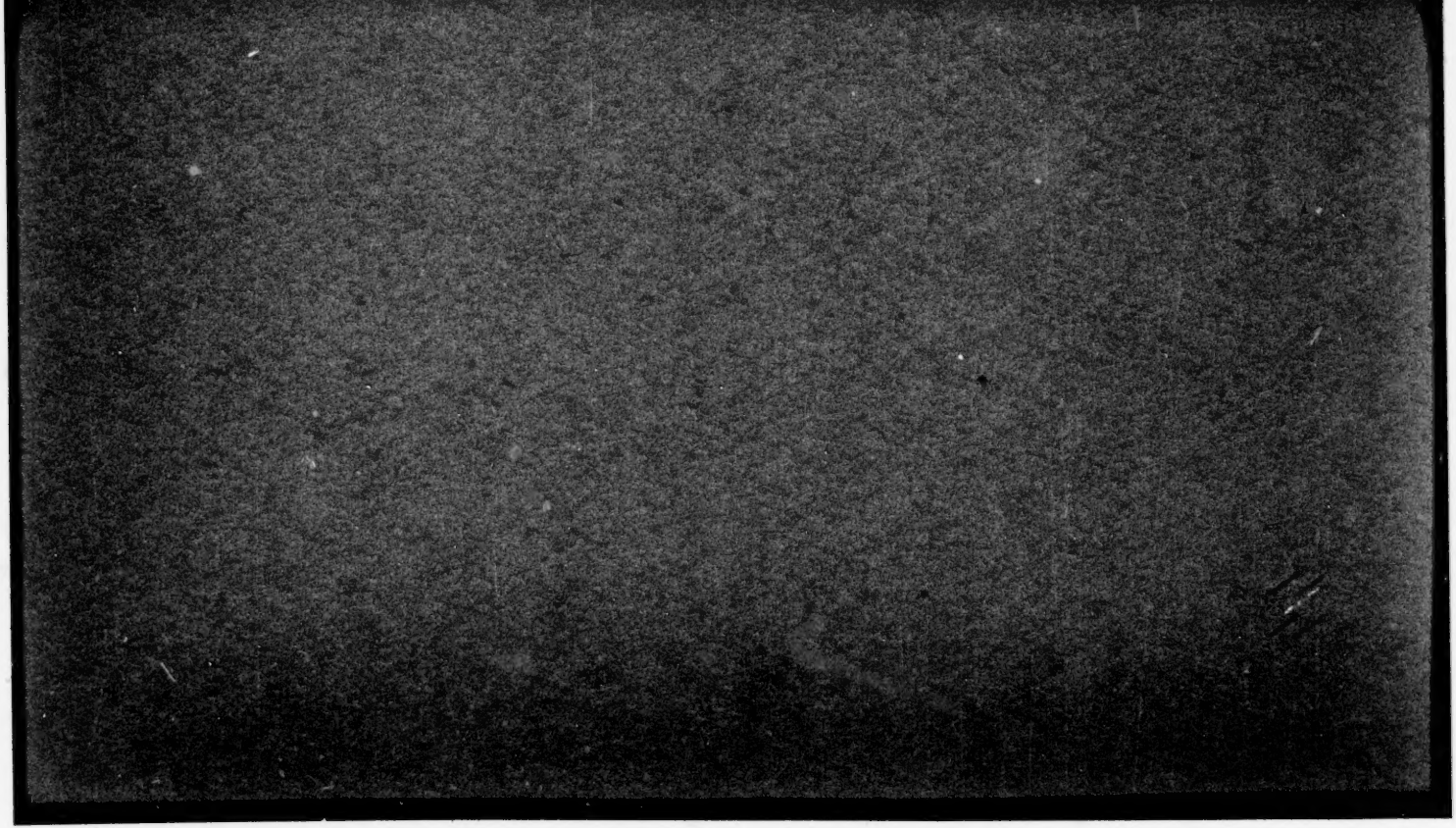
vs.

THE NEW ORLEANS ACID AND FERTILIZER COMPANY, THE CANADIAN COUNTY MILL AND ELEVATOR COMPANY, THE MORRIS McGRAW WOODEN WARE COMPANY, AND WILLIAM J. SANDOZ, TRUSTEE IN BANKRUPTCY OF O. GUILLORY & CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED MARCH 3, 1898.

(20,006.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 631.

ALEXANDER MILLER, PLAINTIFF IN ERROR,

vs.

THE NEW ORLEANS ACID AND FERTILIZER COMPANY, THE CANADIAN COUNTY MILL AND ELEVATOR COMPANY, THE MORRIS McGRAW WOODEN WARE COMPANY, AND WILLIAM J. SANDOZ, TRUSTEE IN BANKRUPTCY OF O. GUILLORY & CO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 13, 1907.

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a UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

No. 15831.

NEW ORLEANS ACID AND FERTILIZER COMPANY and Others
versus
O. GUILLORY AND COMPANY and Others.

W. J. Sandoz and T. M. & J. D. Miller, Lewis & Lewis, for Plaintiff in Error.
E. B. Bubuisson and L. Austin Fontenot, for defendant in error.

Writ of Error to the Supreme Court of the State of Louisiana from the Supreme Court of the United States of America, returnable at the city of Washington, D. C., within thirty days (30) from the twenty-eighth day of January, A. D. 1907.

Transcript of Record.

1 Transcript of Appeal.

Supreme Court of the State of Louisiana.

Appeal from Sixteenth Judicial District Court, St. Landry.

No. 17415.

NEW ORLEANS ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET AL.

Petition.

To the Honorable Judge of the Sixteenth Judicial District Court, in and for St. Landry Parish, Louisiana:

The petition of the New Orleans Acid & Fertilizer Co., a corporation organized under the laws of the State of New Jersey, domiciled at Guttenburg in said State, and doing business in the City of New Orleans, La., herein appearing by due authority; of the Canadian County Mill & Elevator Co., a corporation organized under the laws of the State of Kentucky, domiciled and doing business at El Reno, Oklahoma, and herein appearing by due authority; and of Morris McGraw Wooden Ware Co., a corporation organized under the laws of the State of Louisiana, domiciled and doing business at New Orleans, in said State, and herein appearing by due authority, with respect represent:

That they are creditors of O. Guillory & Co., a commercial firm composed of Olivrel Guillory, Olivrel E. Guillory and Ambrois

Lafleur, residents of the above parish and State, located and doing business at Eunice, in said parish, in the following amounts, and as follows, to-wit:

That on the 12th day of December, 1903, the said O. Guillory & Co. entered into a contract with the first named petitioner,
2 the New Orleans Acid & Fertilizer Co., for the purchase of 208 tons of fertilizers, at $15 and $19 per ton, respectively, which were to be shipped as directed, during the first two months of the following year, same being payable on May 1, 1904, or on that date if mutually satisfactory, the purchasers were to execute notes in payment of the amount due, all of which appears by the annexed contract hereto attached for reference and proof; that the goods thus contracted for were shipped and delivered to said O. Guillory & Co., as directed, the total amount of said contract price being the sum of Three Thousand Two Hundred and Forty and 50-100 Dollars, same being due and payable May 1, 1904, and to bear 8% interest from said date until paid; that on May 1, 1904, after said debt became due, as above, they sent this petitioner the note hereto annexed and now specially referred to, for the said sum of $3240.50, dated Eunice, La., May 1, 1904, payable Dec. 1, 1904, with 8% interest from maturity until paid, and stipulated to pay reasonable attorney's fees if not paid at maturity, said note being signed by O. Guillory, O. E. Guillory and A. Lafleur, the partners composing the firm of O. Guillory & Co., said note having been accepted by petitioners as only cumulative and in no wise to be considered as a novation of their contractual rights with the said O. Guillory & Co.; that the said note is also past due and unpaid, despite amicable demands for its payment, and that petitioner is entitled to judgment for the full sum of $3240.50, interest and reasonable attorney's fees, which petitioner suggests should be fixed at ten per cent. on the amount sued for;

That said O. Guillory & Co. are likewise indebted unto the Canadian County Mill & Elevator Co., petitioner secondly above named, in the full and true sum of Six Hundred and Thirty-six and 33-100 Dollars, with 8% interest from June 14, 1904, until paid, for goods and merchandise sold and delivered to them, as will be duly shown, the same being represented by a note executed by O. Guillory,
3 O. E. Guillory and A. Lafleur, the members of said firm, said note being due and payable Dec. 1, 1904, same having been accepted as merely cumulative and not as a novation of said debt, the same being due and unpaid despite amicable demands, and this petitioner is likewise entitled to judgment against said O. Guillory & Co. in the full amount stated;

That said O. Guillory & Co. are likewise indebted unto Morris McGraw Woodenware Co., petitioner last above named, in the full sum of Two Hundred and Sixty and 51-100 Dollars, with legal interest thereon from judicial demand, for goods sold and delivered to them, as will be duly shown, the same being due and unpaid despite amicable demands, and this petitioner is also entitled to judgment against the said O. Guillory & Co. in the full amount stated:

Petitioners now aver that for more than three months last past

the said O. Guillory & Co., and the individual members of said firm, Olivrel Guillory, O. E. Guillory and A. Lafleur, have been and are insolvent, having so declared also in a communication addressed to their creditors on Dec. 13, 1904, as will be duly shown that notwithstanding said fact the said firm and the individuals composing it have been fraudulently transfer-ing, assigning or disposing of their property with the fraudulent intent to deprive their creditors of their recourse to same, or of defeating their rights in the same, and those of petitioners especially; or of giving an unfair preference to some of them; that this action on their part has resulted to the injury of their creditors, and petitioners especially, they as a firm and as individuals having but little property still in their possession or control, the same being insufficient to pay the debts still due by them, and particularly the amounts due petitioners;

That in pursuance of said fraudulent intent the said O. Guillory & Co. on the 26th day of November, 1904, by act before F. X. Bennen, Notary, executed in favor of Joseph Aurelien Fontenot, a resident of the above parish, a simulated or fraudulent transfer of the following described property, for the simulated price of $2.50 cash and $337.50 represented by a note, the said Fontenot being in fraud and bad faith and well-knowing the insolvent condition of the vendors or transferrors, to-wit:

"A certain tract of cultivated prairie land being a fractional part of original homestead of Theodule Ardoin and acquired by vendors of present purchaser by act of sale executed this date; said tract of land contains 40 acres and is bounded on the north by land of Theodule Ardoin and his wife, Alida Ortego, on the west by land of Zeno Ardoin, on the south by R. R. land, on the east by land of Valmon Vizina, also including all buildings and improvements thereto belonging."

That in further pursuance of said fraudulent intent the said Olivrel Guillory, on the 7th day of December, 1904, by act before J. R. Pavy, Notary, executed in favor of his son-in-law, Alexandre Miller, also a resident of the above parish, a simulated or fraudulent transfer of the following described property, for the simulated price of $7,500 cash, the said Miller being in fraud and bad faith and well-knowing the insolvent condition of the said Guillory, to-wit:

"The following lots of ground situated in the town of Eunice, La. with all the buildings and improvements thereon, including the gin and gin-house situated on the same, and being lots 1, 2, 3, 4, 5, and 6, of Block 14 as per plat of said town on file in the Recorder's Office of the parish of St. Landry, and being the same lots acquired by vendor from Rev. Alf. Bachiochi. From the above is reserved a small dwelling erected on lot No. 6 of above block by Robert Tate."

That in pursuance of such fraudulent intent the said Olivrel Guillory on the same day, by act before the same Notary, executed in favor of John A. Haas and Samuel Haas, residents of the above parish, a simulated or fraudulent transfer of the following described property, for the simulated consideration of $2000 cash, and the assumption of three notes of $2000 each, drawn by said Guillory to the order of the St. Landry State Bank, dated

Opelousas, La., Feb. 25, 1904, and payable 1, 2, and 3 years after date, with 8% interest from date, the said John A. Haas and Samuel Haas being in fraud and bad faith and well-knowing the insolvent condition of the said Guillory at the time, to-wit:

"1. A certain tract of prarie land in Prairie Mamou, at Pt. Grand Louis, parish of St. Landry, with all the buildings and improvements thereon, being all of section 4, T. 5, S. R. 1 W., La. Mer., and containing 650 acres, bounded north by widow Denis Lejacques, south by J. A. Haas, east by R. R. land, and west by Onez J. Fontenot, saving and excepting four acres sold by vendor to Arville Deshotels and a strip of 350 ft. wide running along the north line of said section sold to Union Rice & Irrigation Co., and being the same property acquired by vendor from the United States, as appears by patents duly recorded in Conveyance Book R 3, pp. 271-2-3, and from Augustine Gradnigo, as per act recorded in Conveyance Book N 2, p. 182, Recorder's Office of the parish of St. Landry;

"2. A certain tract of land in Prairie Mamou, with all the buildings and improvements thereon, being the S. ½ of S. W. ¼ of Sec. 38, T. 4, S. R. 1 W., La. Mer., containing 100 arpents, more or less, bounded north by land herein below described, east by vendor, south by land of C. C. Duson and west by * * *

"3. A certain tract of land adjoining the tract above described and known and designated as the N. W. ¼ of the S. E. ¼ and the N. E. ¼ of the S. W. ¼ of Section 38, T. 4, S. R. 1 W., La. Mer., containing 100 arpents more or less, bounded north by purchaser, east by Wm. Raymond Deshotel, south vendor, and west Thos.
6 Israel; the above two tracts being the same acquired by vendor from present purchaser Jan. 10, 1899, as appears by act 42685, recorded Bk. Q 3, pp. 178, saving and excepting 35 arpents sold by present vendor to A. Deshotels, as per act recorded in Book N 3, p. 325, Recorder's Office, St. Landry;

"4. A certain tract of land lying in Prairie Mamou, St. Landry Parish, containing 100 arpents, bounded north and west by lands formerly of Dr. J. H. Parker, south by R. R. land, east by former homestead of Dr. Walters, and being the east end of a tract acquired by J. H. Parker from Andrew Lubin, and being same acquired by vendor from Dr. J. H. Parker, Apr. 8, 1893, as per act recorded in Book D 3, 171, Recorder's Office, St. Landry."

That in further pursuance of said fraudulent intent the said Olivrel Guillory on the 8th day of December, 1904, by act before Ed. Dardeau, Notary, executed in favor of Francois E. Savoie, of the above parish, a simulated or fraudulent transfer of the following described property, for the simulated price of $3500 cash, the said Savoie being in fraud and bad faith, and well-knowing the insolvent condition of the vendors at the time, to-wit:

"Three-quarters of lot 1 and the whole of lot 2 in Block 12, in Eunice, La., together with all the buildings and improvements thereon; also lots 7 and 8, Block 5, in Eunice, La., together with all the buildings and improvements thereon.

"¾ of lot 1, block 12 acquired by vendor from Gus. Fuselier, and

lot 2, block 2 acquired by exchange with O. Guillory, Jr., and lots 7 and 8, block 5 were acquired by vendor from J. J. Lewis."

Petitioners aver that the said O. Guillory & Co., and the individuals composing said firm, Olivrel Guillory, O. E. Guillory and A. Lafleur, and their alleged vendee, Joseph Aurelien Fontenot, and the said Olivrel Guillory and his alleged vendees, viz, Alex-
7 andre Miller, John A. and Samuel Haas, and Francois E. Savoie, colluded together to defraud the creditors of the said O. Guillory & Co. and to despoil them of their rights, and to place all the property of the said O. Guillory & Co., and of the individuals composing said firm, (except a small portion thereof, to-wit: the remnant of their stock of goods), beyond the reach of their creditors then existing, and to be the better able to defraud them, and petitioners especially, or to give an unfair preference to some of them;

That all of the above purported transactions are pure and simple simulations, and if not simulated are fraudulent, prohibited by law, illegal, null and void, for the following reasons, viz:

1st. That no consideration was given, or passed, in said purported acts, the same being intended, by all parties thereto, to fraudulently screen the several properties purported, but not really, conveyed or intended to be conveyed, from the pursuit of the creditors of the pretended vendors or transferrors in said acts, and especially petitioners, they and each of them being insolvent to the knowledge of said pretended transferees, and said acts purporting to convey nearly all of the alleged transferrors' property, and not leaving in their name sufficient property to pay petitioners, or the other creditors;

2nd. That if said transactions be real, they are mere *dations en paiement*, in the form of sales, the real consideration not being a price in money, but transfers made to pay alleged, or existing debts, due transferees in said acts, while the transferrors were insolvent;

3rd. That if said transactions be real, they were and are fraudulent to the knowledge of both parties thereto, and were made in bad faith, both parties intending to defraud petitioners and the other creditors thereby, and to secure a fraudulent and illegal preference to transferees over the other creditors and petitioner especially,
8 as said O. Guillory & Co., and the individual members of said firm, were notoriously insolvent at the time and since, to the knowledge of all said parties, and have not other sufficient property to pay petitioners and the other creditors and because said properties were transferred for less than four-fifths of their real value, if not merely intended to secure an illegal payment of existing debts due transferees, which petitioners aver was the fact;

The premises considered, petitioners pray that the said O. Guillory & Co. and the individuals composing said firm, and the said Olivrel Guillory in his individual capacity, and the said Joseph Aurelian Fontenot, Alexandre Miller, John A. Haas, Samuel Haas and Francois E. Savoie, be all cited to answer this petition and served with a copy hereof, and in due course, that judgment be rendered against O. Guillory & Co. and Olivrel Guillory, O. E. Guillory and Ambroise Lafleur, *in solido*, and in favor of the petitioners, in the following amounts, viz: to the New Orleans Acid & Fertilizer Co.,

in the full sum of $3240.50, with 8% interest from May 1, 1904, until paid, and 10% on the amount of principal and interest as attorney's fees; to the Canadian Mill & Elevator Co. in the full and true sum of $636.33, with 8% interest from June 14, 1904, until paid; and to Morris McGraw Woodenware Co. in the full and true sum of $260.51, with legal interest from judicial demand; and that judgment be likewise rendered in petitioners' favor and against the said Alexandre Miller, Joseph Aurelien Fontenot, John A. Haas, Samuel Haas and Francois E. Savoie, decreeing said alleged transfers simulated, and if not simulated, fraudulent, null and of no effect, and that the properties hereinbefore described be sold and the proceeds be subjected to petitioners' debts and the judgments herein to be rendered by privilege and preference; and petitioners pray that an order of *lis pendens* be entered of record during these proceed-
9 ings, as provided by law, and they pray for costs, all necessary orders and decrees and for general relief.

(Signed) W. J. SANDOZ,
" T. M. & J. D. MILLER,
Attorneys for Petitioners.

Filed Feb. 2, 1905.
(S'g'd) PAUL W. LAFLEUR, *Dy. Clerk.*

Note Attached to Petition. "A."

$3240.50. EUNICE, LA., *May* 1, 1904.

December first after date we promise to pay to the order of New Orleans Acid and Fertilizer Company Three Thousand Two Hundred Forty & 50-100 Dollars, value received at Louisiana National Bank, New Orleans, La. The right of exemption is hereby waived as provided in Constitution and Laws of this State, and it is further agreed that the undersigned shall pay all costs of collection, including a reasonable attorney's fee if not paid at maturity, and interest at 8 per cent. per annum from maturity until paid.

No. 138. Due Dec. 1, 1904.

(S'g'd) O. GUILLORY.
" O. E. GUILLORY.
A. LAFLEUR.

Contract Attached to Petition. "B."

New Orleans Acid & Fertilizer Company.

NEW ORLEANS, LA., *Dec.* 12, 1903.

To O. Guillory & Co., Eunice, La.

DEAR SIR-: The New Orleans Acid & Fertilizer Company agrees to sell you:

75 { Tons Black Diamond Acid Phosphate at $15 per ton
{ Tons Blood, Bone and Potash at $19 per ton

f. o. b. cars at Eunice, La., you to pay freight, which will be
10 deducted from the above price.

Terms: Cash, May the 1st next, or on that date if mutually

satisfactory, you will give three notes for the price thereof, including interest from said May the 1st, to maturity, at 8 per cent. per annum, and due 15th of October, 1st and 15th of November, thereafter, and payable at some bank in New Orleans, La.

A cash discount of 8 per cent. per annum on above prices from date of payment to May 1st next will be allowed. All goods under this contract must be ordered out prior to May 1st next.

This contract is subject to suspension or termination in case of fire or accident or in case of any contingency beyond the seller's control.

This contract is subject to the approval of the said Company.

Given in duplicate the day and year first above written.

Yours truly,

NEW ORLEANS ACID & FERTILIZER CO.,
By WM. E. TURNER, *Salesman.*

We accept your offer on the above stated terms, this the 12th day of Dec., 1903.

O. GUILLORY & CO.

Rating T-C (D) E 2½.
Fgt Rt 2.75.

Approved, Dec. 14, 1903.

By W. L. GOLDSMITH, *Mgr.*

Endorsement on Back:

O. Guillory & Co., Eunice, La.

75 tons	25 tons Jan. 4	40 tons Jan. 21	80 tons Feb. 4
	33 " Feb. 15	30 " Feb. 16	

208

Entered. E. K. Huey. 44.

Endorsement on Margin: Ship Black Goods.

11 Extract of Minutes of Feb. 23, 1905.

Court met pursuant to law.
Present: His Honor E. T. Lewis, presiding judge.

17415.

N. O. ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

Default *versus* all except those defendants who have filed exceptions.

Extract of Minutes of Thursday, Feb. 27, 1905.

Court met pursuant to law.
Present: His Honor Edward T. Lewis, presiding judge.

17415.

N. O. ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

Answers filed for O. Guillory & Co., Alex. Miller and Francois E Savoie, and prayer for jury allowed upon the parties making the deposit of $12.00 as required by law and furnishing bond with good security for jury costs in the sum of $200.

Exceptions filed in this case are submitted on briefs to be filed within five days.

Answer of O. Guillory & Co.

No. 17415.

16th Jud. Dist. Court, St. Landry Parish, La.

N. O. ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & COMPANY ET AL.

Now into court comes O. Guillory & Co., one of the defendants in the above numbered and entitled suit, and for answer to plaintiffs' petition pleads the general issue.

12 Further answering respondent avers that this case is triable by jury.

Wherefore respondent prays that a jury may be allowed for the trial of this case and that after due proceedings had the demands of the plaintiffs be rejected at their costs and for general relief.

(S'g'd) E. B. DUBUISSON,
" L. AUSTIN FONTENOT,
Attorneys for Respondent.

Filed Feb. 27/05.
PAUL W. LAFLEUR, *D'y Clerk.*

Answer Alexandre Miller & Francois E. Savoie.

16th Jud. Dist. Court, St. Landry Parish, La.

No. 17415.

N. O. ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & CO. ET AL.

Now into Court come Alexandre Miller and Francois E. Savoie, defendants in the above numbered and entitled suit and for answer to plaintiffs' petition deny all and singular the allegations therein contained.

For further answer they aver that this cause is triable by a jury

and that they desire to join their co-defendant O. Guillory & Co. in praying for that mode of trial.

Wherefore, the premises considered, respondents pray that this cause may be tried by jury and that, after due hearing, plaintiffs' suit be dismissed at their costs and for general relief.

(S'g'd) E. B. DUBUISSON,
Attorney for Respondents.

Filed Feb. 27, 1905.
PAUL W. LAFLEUR, *D'y Clerk.*

13 Extract Minutes Monday, June 26, 1905.

Court met pursuant to law.
Present: His Honor E. T. Lewis, presiding Judge.

17415.

N. O. ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

Motion made and granted to make Trustee W. J. Sandoz party plaintiff to the suit, filed and allowed.

Motion to Make Trustee O. Guillory & Co. Party Plaintiff.

District Court, St. Landry Parish, La.

No. 17415.

N. O. ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & CO. ET ALS.

Now into this Honorable Court, through his undersigned counsel, comes William J. Sandoz, the duly appointed and qualified Trustee of the Bankrupt Estate of the said O. Guillory & Co., and respectfully shows:

That since the institution of this suit the said O. Guillory & Co. have made application for and been adjudged Bankrupts in the District Court of the United States for the Western District of Louisiana;

That under the Bankrupt Law of the United States (Act of 1898) the Trustee of a Bankrupt Estate succeeds to the rights of the creditors who may have brought actions to annul any transactions affecting the property of the Bankrupts, and the law makes it his duty to prosecute the same for the benefit of the said Bankrupt Estate in his capacity as Trustee;

14 Wherefore, the premises considered, the said William J. Sandoz, Trustee, prays to be made a party plaintiff in this suit and duly authorized to prosecute same to final judgment for the benefit of the said Bankrupt Estate of O. Guillory & Co., and he

prays for service of this petition, and of order herein, on defendants, for costs and for general relief.

(S'g'd) By His Attorney, KENNETH BAILLIO.

Order.

The foregoing petition and prayer considered, it is ordered that William J. Sandoz, Trustee of the Estate of O. Guillory & Co., be and he is hereby made a party plaintiff in the above entitled and numbered cause, with authority to prosecute the same to final judgment for the benefit of the said Bankrupt Estate.

Done, ordered and signed, in open Court, at Opelousas, La., on this, the 26th day of June, A. D. 1905.

(S'g'd) E. T. LEWIS,
Judge 16th Jud. Dist. Court of La.

Filed June 26, 1905.
PAUL W. LAFLEUR, *D'y Clerk.*

Service accepted 6/26/05.

(S'g'd) E. B. DUBUISSON,
Att'y for O. Guillory & Co., Francois E. Savoie, and Alexandre Miller.

(S'g'd) LEWIS & LEWIS,
Attorneys for John A. & Sam Haas.

No. 17415.

NEW ORLEANS ACID & FERTILIZER COMPANY ET AL.
vs.
O. GUILLORY & COMPANY ET AL.

15 *Note of Evidence upon the Trial of this Case.*

Plaintiffs' Evidence.

1. Note declared upon in the petition of O. Guillory, O. E. Guillory and Ambroise Lafleur, dated May 1st, 1904..... Marked "A."
2. Account of New Orleans Acid & Fertilizer Co. with O. Guillory & Company, dated Dec. 12, 1903... Marked "B."
3. Note of O. Guillory & Co. in favor of the Canadian County Mill & Elevator Co. for $636.33 Original offered with leave to substitute certified copy..... Marked "C."
4. Extract from schedule A 3 in the bankruptcy proceedings of O. Guillory & Co. filed in the District Court of the United States for the Western Dist. of Louisiana, together with affidavit of the bankrupts on schedule A 5. Original offered with leave to substitute certified copy..... Marked "D."

5. Petition in bankruptcy of Olivrel Guillory, O. E. Guillory and Ambroise Lafleur, composing the firm of O. Guillory & Company, filed in the District Court of the United States for the Western District of Louisiana. Original offered with leave to substitute certified copy..... Marked "E."
6. Act of date Dec. 8th, 1904, from O. Guillory to Francois E. Savoie, passed before Edward Dardeau, notary public, with certificate of registry of same. This act is offered to prove *rem ipsem.* Original offered with leave to substitute certified copy..... Marked "F."
7. Act of date Dec. 7th, 1904, from O. Guillory to Alexandre Miller, passed before James R. Pavy, notary public, together with certificate of registry. This document being offered to prove a *rem ipsem.* Original offered with leave to substitute certified copy..... Marked "G."
8. Act of date Dec. 7th, 1904 from O. Guillory to John A Haas and Samuel Haas, passed before James R. Pavy, notary public, together with certificate of registry of same, this act being offered to prove *rem ipsem.* Original offered with leave to substitute certified copy..... Marked "H."
9. Depositions of Gus E. Fontenot, of Acadia Parish, taken under commission by P. J. Pavy, notary public of Acadia Parish..... Marked "I."
10. Letter of O. Guillory & Co. to the Canadian County Mill & Elevator Co. of El Reno, Oklahoma, dated Dec. 13th, 1904, signature of O. Guillory & Co. admitted..... Marked "J."
11. Letter of O. Guillory & Company, of date November 19th, 1904, to New Orleans Acid & Fertilizer Co. Signature admitted..... Marked "K."
12. Letter of date Dec. 13th, 1904, to New Orleans Acid & Fertilizer Co. from O. Guillory & Co. Signature admitted..... Marked "L."
13. Statement of December 17th, 1904, signed O. Guillory & Co. per O. E. Guillory. Signature admitted..... Marked "M."
14. Letter of O. Guillory & Co. to T. M. & J. D. Miller, dated Jan. 9th, 1905. Signature admitted..... Marked "N."
15. Certificate of mortgage showing mortgage recorded against Francois E. Savoy, of date July 25, 1905..... Marked "O."
16. Testimony of Charles F. Boagni..... Marked "P."
17. Testimony of Ed. White..... Marked "Q."
18. " " A. J. Harrell..... Marked "R."

17

19. Testimony of Theogene Reed..... Marked "S."
20. " " Louis Meyer..... Marked "T."
21. " " Evariste Vidrine..... Marked "U."
22. " " J. W. Mulligan..... Marked "V."
23. Charter of the Eunice Mercantile Company, Limited, Original offered with leave to substitute certified copy, as also publication of the said charter in the Eunice Gall and registry of the act of incorporation.....

Objection.

Objected to. Objection sustained. Bill reserved.

Defendants' Evidence.

1. Testimony of R. J. Richard..... Marked "No. 1"
2. " " Azelien Fruge..... Marked "No. 2"
3. " " James J. Lewis..... Marked "No. 3"
4. Act of sale No. 54880, Etienne Fusilier, Jr., to J. A. Haas, of date March 25, 1905, with certificate of registry thereto attached..... Marked "No. 4"
5. Act of Sale No. 54357, Gibson Fruge to Dr. J. A. Haas, of date Jan. 4th, 1905, with certificate of registry thereto attached..... Marked "No. 5"
7. Act of sale No. 54906, Augustine Molitor, wife, to John A. Haas of date March 24, 1905, with certificate of registry thereto attached.. Marked "No. 6"
7. Act of sale No. 52168, Josien Vidrine to Dr. J. A. Haas, of date Dec. 13th, 1903, with certificate of registry..... Marked "No. 7"
8. Act of sale No. 54584, Theophile V. Soileau *et al.* to John A. Haas, of date February 1, 1905, with certificate of registry thereto attached..... Marked "No. 8"

18

9. Act of sale No. 53305, Pacific Improvement Co. to Alphonse Fusilier, of date July 16th, 1904, with certificate of registry thereto attached ..... Marked "No. 9"
10. Act of sale No. 54653, Rosamond Landreneau to John A. Haas, of date Jan. 12, 1905, with certificate of registry thereto attached..... Marked "No. 10"

The above acts of sale are offered in the original with leave to substitute certified copy.

11. Testimony of Azelien Fruge, recalled..... Marked "No. 11"
12. Certified copy of act of special mortgage of date Feb. 25, 1904, O. Guillory to the St. Landry State Bank ..... Marked "No. 12"

13. Three mortgage notes identified with the above act of mortgage, with signatures cancelled..... Marked "No. 13"
14. Testimony of Alexandre Miller, taken under commission..... Marked "No. 14"

Objection.

Objected to. Objection overruled. Bill reserved.

15. Testimony of Edward Dardeau..... Marked "No. 15"
16. " " Francois E. Savoy..... Marked "No. 16"
17. Certified extract of assessment of O. Guillory for the year 1904..... Marked "No. 17"

Plaintiffs' Evidence in Rebuttal.

1. Testimony of Gustave Fusilier..... Marked "X"
2. Act of W. Mayo Miller to Alexandre Miller of date Dec 14, 1901, together with certificate of registry endorsed thereon. Original offered
19 with leave to substitute certified copy..... Marked "Y"

Objection.

Objected to. Objection sustained. Bill reserved.

3. Acts of sale Nos. 53612 & 53613, from Alphonse Fusilier to Adoss A. Guillory and Laurent Ardoin, of date Aug. 29th, 1904, with certificate of registry. Original offered with leave to substitute certified copy..... Marked "Z"
4. Note of O. Guillory in favor of A. Miller, dated Jan. 18th, 1904, for $3,000.00, together with endorsements thereon. Original offered with leave to substitute certified copy..... Marked "AA"

The above and foregoing being all the evidence adduced and documents filed upon the trial of the above numbered and entitled cause, I have closed this note of evidence this — day of July A. D. 1905.

(Signed) PAUL W. LAFLEUR, *D'y Clerk.*

Filed July 26, 1905.
PAUL W. LAFLEUR, *D'y Clerk.*

Note in Favor of Canadian Mill & Elevator Co., Marked "C."

$636.33. EL RENO, OKLAHOMA, *June 14th*, 1904.

On December 1st, 1904, waiving grace or protest, We promise to pay to the order of Canadian Mill & Ele. Co. Six Hundred Thirty-six and 33-100 Dollars, value received, payable at the Citizens National Bank, of El Reno, Oklahoma, with 8 per cent. interest per annum

thereon from date until paid. If the interest be not paid
20 when due, to become as principal and bear the same rate of interest.

(Signed) O. GUILLORY.
" O. E. GUILLORY.
" A. LEFLEUR.

P. O. Eunice, La.

Filed July 25/05.
PAUL W. LAFLEUR, *D'y Cl'k.*

Oath to Schedule A. Marked "D."

UNITED STATES OF AMERICA, *Western District of Louisiana, ss:*

On this 28th day of April, A. D. 1905, before me personally came Olivrel Guillory, Olivrel E. Guillory and Ambroise Lafleur, the persons mentioned in and who subscribed to the foregoing schedule, and who being duly sworn, did declare the said schedule to be a statement of all his *febts*, in accordance with the acts of Congress relating to bankruptcy.

(Signed) his OLIVREL x GUILLORY. mark
" OLIVREL E. GUILLORY.
" AMBROSE LAFLEUR.

Witness:
(S'g'd) E. B. DUBUISSON.

Subscribed and sworn to before me this 28th day of April, A. D. 1905.

(Signed) L. AUSTIN FONTENOT,
Notary Public.

Filed July 26, 1905.
PAUL W. LAFLEUR, *D'y Cl'k.*

Partnership Petition in Bankruptcy. Marked "E."

To the Honorable Aleck Boarman, Judge of the District Court of the United States for the Western District of Louisiana:

The petition of Olivrel Guillory, Olivrel E. Guillory & Ambroise Lafleur, respectfully represents:

21 That your petitioners have been partners under the firm name of O. Guillory & Co. having their principal place of business at Eunice, in the parish of St. Landry, and Western District of Louisiana, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their

creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the Schedule hereto annexed, marked A, and verified by petitioners' oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by petitioners' oath, contains an accurate inventory of all the property real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts;

And said Olivrel Guillory further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And the said Olivrel E. Guillory further states that the schedule hereto annexed marked E, verified by his oath, contains a
22 full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said Ambroise Lafleur further states that the schedule hereto annexed marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

(Signed) his
OLIVREL x GUILLORY,
mark
" OLIVREL E. GUILLORY,
" AMBROISE LAFLEUR,
Petitioners.

Witness:
E. B. DUBUISSON,
(S'g'd) E. B. DUBUISSON, *Attorney.*

Olivrel Guillory, Olivrel E. Guillory and Ambroise Lafleur the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information and belief.

his
(S'g'd) OLIVREL x GUILLORY,
mark
" OLIVREL E. GUILLORY,
" AMBROISE LAFLEUR,
Petitioners.

Witness:
E. B. DUBUISSON.

23 Subscribed and sworn to before me this 28 day of April, A. D. 1905.
(S'g'd) L. AUSTIN FONTENOT,
[SEAL.] *Notary Public.*

Filed 7/26/05.
PAUL W. LAFLEUR, *D'y Clerk.*

Letter, O. Guillory & Co. to N. O. Acid & Fertilizer Co. "K."

EUNICE, LA., *Nov. 19th*, '04.

N. O. Acid & Fertilizer Co., New Orleans, La.

GENTS: Referring to our note of $3240.50 due you Dec. 1st, 1904, We are not surprised that cotton has declined gradually, as we did not, and as yet do not anticipate a better tone to the market until Dec. and a material advance from then on. We have sufficient cotton from our customers, stored with us unsold to cover twice the am't of our note, if we insisted upon their settling now, but this would force upon them a premature loss in their opinion and certainly work disaster to our business in the future. We therefore consider that paying interest on our note will be insignificant, as compared to forcing a settlement upon our customers now. We therefore desire you to compute interest for 30 days more on our note, which we will remit at once. Hoping to be favored in this respect, we are
Yours truly, O. GUILLORY & CO.

Filed July 25, '05.
PAUL W. LAFLEUR, *D'y Clerk.*

Letter, O. Guillory & Co. to N. O. Acid & Fertilizer Co. "L."

EUNICE, LA., *Dec. 13th*, 1904.

N. O. Acid & Fertilizer Co., New Orleans.

GENTS: The recent slump in cotton caught us with a large lot of spots on hand which we were compelled to close out at an
24 enormous loss. As a result we are unable to meet our obligations, and in order to determine upon a course of action that

will meet the approval of a majority of our creditors, we are writing them all this circular letter. We request that you name a time and place when and where we might meet you in common with our other creditors to discuss the situation and determine upon a course of action.

As soon as we shall have heard from all or a majority of our creditors, we shall notify you of the time and place of meeting.

Very respectfully, O. GUILLORY & CO.

Filed 7/25/05.
PAUL W. LAFLEUR, *D'y Cl'k.*

Statement of Dec. 17, 1904. "M."

O. Guillory. O. E. Guillory. A. Lafleur.

EUNICE, LA., *Dec. 17th*, 1904.

Bought of O. Guillory & Co., Dealers in General Merchandise.

Statement of Business.

Liabilities:

N. O. Acid & Fertilizer Co.	$3262.10	
Pollock & Bernheimer	3079.18	
Seidel Furniture Mfg. Co.	655.47	
Canadian Co. Mill & Elev. Co.	659.78	
Morris McGraw Woodenware Co.	239.51	
Seessel, Ashner & Sugarman	28.25	
Nicholas Burke Co., Ltd.	31.10	
B. & H. Flaspollers' Sons	168.02	
		$8123.41
W. B. Thompson & Co., aggregate about		10280.00
		$18403.41

Assets:

Stock on hand (approximate)	$4000.00	
Outstanding a/cs	3000.00	
		7000.00
Approximate deficit		$13123.41

25 (S'g'd) O. GUILLORY & CO.,
Per O. E. GUILLORY.

Filed 7/25/05.
PAUL W. LAFLEUR, *D'y Cl'k.*

Letter, O. Guillory & Co. to T. M. & J. D. Miller. "N."

EUNICE, LA., *Jan'y 9th*, 1905.

Messrs. T. M. & J. D. Miller, New Orleans.

GENTLEMEN: Your letter of the 7th inst. in regard to objections etc. of N. O. Fert. Co. is rec'd & fully noted. Our letter of Oct. 17th

may have stated an approximate liability of $7000.00 and approx
imate assets $20,000.00. From present figuring it would seem a
follows:

	Oct. liabilities.	Oct. assets.
	$7943.00	$19687.0
W. B. Thompson & Co. since for cotton.....	42000.00	
This cotton sold for	.....	36382.0
F. Gumbel & Co., since for cotton.....	1090.00	
Collections invested in cotton	17000.00	
	$68033.00	$56069.0
	56069.00	
	11964.00	
Our present assets remaining from our original 19687.00.....	6645.00	
	18609.00	
Liab.....		$18609.0
Assets.....		6645.0

Their demand of a cash settlement from us is entirely impossibl
and the further demand of 50c. on the dollar is artificial in the ex
treme. Our case is not at all complicated, it is a plain loss an
ruin. We would more gladly settle dollar for dollar, but know tha
we can do nothing better than our arrangement with Messrs. Thomp
son & Co. to settle our indebtedness 25c. on the dollar, they to wai
for their debt and accept our existing assets as security. W
26 know this is the best settlement for all our creditors and mos
peaceable for us—although Bankruptcy would be a mor
complete relief to us. We earnestly hope your clients will accede
to the offer of Messrs. W. B. Thompson & Co. and oblige.

Yours very truly, O. GUILLORY & CO.

Filed July 25, 1905.

PAUL W. LAFLEUR, *D'y Clk.*

Act of Special Mortgage, O. Guillory to St. Landry State Bank. No. 11

STATE OF LOUISIANA, *Parish of St. Landry:*

Be it known, that on this 25th day of the month of Feb'y, A. D
1904, before me, Lucius T. Castille, a Notary Public, duly
27 commissioned, qualified and sworn, in and for the parish and
State above written, and in the presence of the witnesses here
inafter named and undersigned, personally came and appeared
Olivrel Guillory, a resident of the parish of St. Landry, La., who
declared that he is justly and truly indebted unto The St. Landry
State Bank, a corporation duly organized under the laws of this
State, having its domicile in the town of Opelousas, La., and herein
represented by Jonas Jacobs, Cashier of said Bank, in the sum of
Six Thousand & no/100 Dollars for money borrowed. In settlement

and as evidence of which said indebtedness the said Olivrel Guillory has furnished his three certain promissory notes all dated Opelousas, La., Feb'y 25th, 1904, drawn to the order of St. Landry State Bank, each for the sum of $2000, payable respectively in one, two, and three years after date, bearing interest at the rate of eight per cent. per annum from date until paid and ten per cent. additional on amount of principal and interest unpaid, if sued upon or placed in the hands of an attorney or collector for collection. Interest payable annually on all the notes, which before recited notes after having been paraphed "*Ne Varietur*" by me, Notary, in order to identify the same herewith were delivered to said Jonas Jacobs, Cashier of St. Landry State Bank who acknowledges the receipt of the same. Now in order to secure the full and punctual payment of the said notes in principal and interest at maturity and attorney's fees as therein provided, the said Olivrel Guillory declares that he does by these presents specially mortgage and hypothecate to and in favor of the St. Landry State Bank represented by Jonas Jacobs, Cashier, here present and accepting for said Bank successors and assigns, and any and all future holder or holders of said notes the following described property, to-wit: 1st. A certain tract of prairie land situated in Prairie Mamou at Point Grand Louis, St. Landry Parish, La., together with all the buildings
28 and improvements thereon, being all of Sec. 4, T. 5 S. R. 1 W., La. Mer., containing 650 acres, bounded North by Wow Denis Lajacques, South by lands of Jno. A. Haas, East by Railroad lands and West by Ozeme J. Fontenot—save and excepting four acres of said section sold by mortgagor to Arville Deshotels and a strip of 350 feet wide running along the North line of said section sold to the Union Rice and Irrigation Company—said above-described land was acquired by mortgagor as follows: the W. ½ of the N. E. ¼ & E. ½ of the N. W. ¼ of said section was acquired by him from Augustine Gradnigo on Jan'y 29—83 & by her acquired from the United States as appears by Patent recorded in Conveyance Book R 3 p. 270, and the balance was acquired by mortgagor from the United States as appears by patents recorded in Conveyance Book R 3 pp. 271-2 Recorder's Office Parish of St. Landry, La. 2d. A certain tract of land situated in Prairie Mamou in this parish, together with the buildings and improvements thereon, being the south half of the S. W. quarter of Sec. 38 in T. 4 S. R. 1 W. containing 100 arpents more or less, bounded north by land of Thos. Israel & the land herein below described, east by land of mortgagor, south by land of C. C. Duson and west by land of —. 3d. A certain tract or parcel of land adjoining the tract above described and known and designated as the N. W. quarter of the S. E. quarter and the N. E. quarter of the S. W. quarter of Sec. 38, in T. 4 S. R. 1 W. containing 100 arpents more or less, bounded North by land of Dr. J. A. Haas East by Wow Raymond Deshotels, south by mortgagor & West by Thomas Israel. The 2d and 3d tract- herein described were acquired by mortgagor from Dr. J. A. Haas as appears by act No. 42685 Recorder's Office.

And the said mortgagor binds himself not to sell, alienate, or

otherwise dispose of or encumber the above described property to th
prejudice of the mortgage rights herein granted.

29 And to further secure the full, prompt and punctual pay
ment of said note together with interest accrused or to accru
thereon, together with costs and legal charges, the said Olivrel Guil
lory does hereby specially waive all homestead rights and exemp
tions guaranteed by the Constitution of this State, in favor of th
holder or future holder or holders of the aforementioned notes.

Contracting parties dispense me, Notary, from the production o
the certificate of mortgage required by Article 3364 of the revise
C. C. of this State. Done and passed at Opelousas, La., on the day
month and year aforesaid, in the presence of E. B. Dubuisson an
Leopold Simon, competent witnesses, who have signed with the ap
pearers and me, Notary, after reading the whole.

(S'g'd) O. GUILLORY.
" ST. LANDRY STATE BANK,
" By JONAS JACOBS, *Cashier.*
" L. T. CASTILLE,
Notary Public.

Witnesses:
E. B. DUBUISSON.
L. SIMON.

Filed Feb. 26, 1904.
(S'g'd) O. B. THOMPSON, *Dy Clerk.*

STATE OF LOUISIANA, *Parish of St. Landry:*

I hereby certify that the within and foregoing is a true and correc
copy of the original act No. — on file and of record in my office i
Mortgage Book No. — pp. —— on Feb. 26th, 1904.

Witness my hand and the seal of my office at Opelousas, La., thi
26th day of the month of Feb'y A. D. 1904.

[SEAL.] O. B. THOMPSON, *Dy Clerk.*

Filed July 26th, 1905.
PAUL W. LAFLEUR, *Dy Clk.*

Three Mortgage Notes Identified with Above Act. No. 13.

OPELOUSAS, LA., *Feb. 25th*, 1904. No. 12877.

Due 2/25/05. $2000.00.

30 One year after date, I promise to pay to the order of St
Landry State Bank Two Thousand & no/100 Dollars, fo
value received, with interest at the rate of eight per cent. per annu
from date until paid, and ten per cent. additional on amount o
principal and interest unpaid, if sued upon or placed in the hand
of an attorney or collector for collection. Interest payable annually

O. GUILLORY.

Witnesses:
E. B. DUBUISSON.
L. SIMON.

Endorsements on face: "*Ne Varietur*" as per Act of Special mortgage passed before me this 25th day of February, 1904. L. T. Castille, Notary Public.

Cancelled July 27, 1905.

L. A. SANDOZ, *Dy Clk.*

Settled by sale of land to S. & J. A. Haas.
Interest 160 $2160.00.
Filed 7/26/05.
PAUL W. LAFLEUR, *Dy Clk.*

Endorsement on Back: Without recourse St. Landry State Bank by Jonas Jacobs Cashier.

OPELOUSAS, LA., *Feb. 25th*, 1904. No. 12878.

Due 2/25/06. $2000.00.

Two years after date, I promise to pay to the order of St. Landry State Bank Two Thousand & no/100 Dollars, for value received, with interest at the rate of 8 per cent. per annum from date until paid, and ten per cent. additional on amount of principal and interest unpaid, if sued upon or placed in the hands of an attorney or collector for collection. Interest payable annually.

O. GUILLORY.

Witnesses:
E. B. DUBUISSON.
L. SIMON.

Endorsements on Face: "*Ne Varietur*" as per Act of Special Mortgage passed before me this 25th day of February, 1904. L. T. Castille, Notary Public.

Cancelled July 27, 1905.

L. A. SANDOZ, *Dy Clk.*

Settled by sale of land to S. & J. A. Haas.
31 Int. 320. $2320.00.
Filed 7/26/05.
PAUL W. LAFLEUR, *Dy Clk.*

Endorsement on Back: Without recourse St. Landry State Bank by Jonas Jacobs Cashier.

OPELOUSAS, LA., *Feb. 25th*, 1904. No. 12879.

Due 2/25/07. $2000.00.

Three years after date, I promise to pay to the order of St. Landry State Bank Two Thousand and no/100 Dollars, for value received, with interest at the rate of 8 per cent. per annum from date until paid, and ten per cent. additional on amount of principal and inter-

est unpaid, if sued upon or placed in the hands of an attorney or collector for collection. Interest payable annually.

O. GUILLORY.

Witnesses:
E. B. DUBUISSON.
L. SIMON.

Endorsements on Face: "*Ne Varietur*" as per Act of Special Mortgage passed before me this 25th day of February, 1904, L. T. Castille, Notary Public.
Cancelled July 27, 1905.

L. A. SANDOZ, *D'y Cl'k.*

Settled by sale of land to S. & J. A. Haas.
Int. 480. $2480.00.
Filed 7/26/05.
PAUL W. LAFLEUR, *D'y Cl'k.*

Endorsement on Back: Without recourse St. Landry State Bank by Jonas Jacobs Cashier.

Testimony of Alexandre Miller Taken under Commission. No. 14.

THE STATE OF LOUISIANA:

Sixteenth Judicial Court in and for the Parish of St. Landry.

To any Judge, Justice of the Peace or Notary Public of Lafayette Ph., Greeting:

Know ye, That we, reposing confidence in your prudence and fidelity, do, by these presents, give unto you authority diligently to examine Alexandre Miller witness in a certain suit now pending in our Court, in which New Orleans Acid and Fertilizer Co. *et*
32 *als.* plaintiffs and O. Guillory & Co. *et als.* defendants on the part of said defendants. Therefore, we desire you at certain times and places, by you to be appointed for that purpose, to cause the said witness to come before you, that you then and there examine him upon his oath first duly administered according to law; that you reduce the said examination to writing, and when you shall have thus taken the same, that you send it closed up under your seal to us, at our said Court, at the Court House, in the Town of Opelousas, Parish of St. Landry, La., on or before the 25th of July, 1905 and have you then and there this commission.

Witness the Hon. E. T. Lewis, Judge of said Court, this 19th day of July, 1905.

PAUL W. LAFLEUR, *D'y Clerk.*

[SEAL.] Filed 7/22/05.
ALFRED PAVY, *D'y Cl'k.*

16th Judicial District Court, St. Landry Parish, La.

No. 17415.

N. O. ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & COMPANY ET AL.

Interrogatories to be propounded under commission and answered under oath by Alexandre Miller, one of the defendants in the above numbered and entitled suit and to be used in evidence on behalf of the defendants on the trial of said suit.

Interrogatory No. 1. What is your name, age, present residence and business?

Interrogatory No. 2. Are you acquainted with Olivrel Guillory, of Eunice, La., and related to him? If so, state how long you have known him and what relation or connection you bear towards him.

Int. No. 3. Have you ever had any business dealings with Olivrel Guillory? If so, state their nature and kind.

Int. No. 4. If you state that you bought a ginning outfit and the ground upon which the same is situated in the town of Eunice, in the parish of St. Landry, on December 7th, 1904, from said
33 Guillory by act passed before J. R. Pavy, notary public, for $7,500.00, please state whether said amount was actually paid in cash or not.

Int. No. 5. Did Olivrel Guillory, at the time of said purchase, owe you any money? If so, please state how much and when and where he paid you the amount then due you and whether it was before or after the purchase by you of said ginning plant.

Int. No. 6. It is alleged in the petition of the plaintiffs that you did not pay any money for said ginning plant as recited in the notarial act which purports to evidence the contract between you. Is that allegation true or not true?

Int. No. 7. It is alleged in the alternative that at the time Olivrel Guillory sold you said ginning plant he was insolvent; that you knew that he was insolvent; and that you purchased said gin with a view of defrauding his creditors. Is that true or not true? Please answer this question in detail.

Int. No. 8. Please state any other fact within your knowledge that would be to your advantage in the suit aforesaid as fully and completely as if specially interrogated in regard thereto.

Respectfully submitted,

E. B. DUBUISSON,
Of Counsel for Defendants.

Service accepted July 19th, 1905.

W. J. SANDOZ, *Att'y Pl'ff.*

Service accepted and delays waived.

LEWIS & LEWIS,
Att'ys for Sam & John A. Haas.

Filed July 19, '05.

PAUL W. LAFLEUR, *D'y Cl'k.*

District Court, St. Landry Parish, La.

No. 17415.

N. O. Acid & Fertilizer Co. et al.
vs.
O. Guillory & Co. et als.

Cross Interrogatories to be propounded to the witness, Alexandre Miller, one of the Defendants, and to be answered under oath under the attached commission:

34 1. If you in answer to interrogatory No. 5 state that O. Guillory owed you any money, please state whether you held the note of O. Guillory as the evidence of that debt.

2. If you say that at the time of the sale of the gin plant to you that you held O. Guillory's note for any amount, please state what O. Guillory owed you this note for, or what property or money had you given him for that debt?

3. When did O. Guillory pay you this note?

4. Did he pay you the amount of this note before the sale, or at the time of the sale, or afterwards?

5. Do you claim to have actually paid O. Guillory $7,500 in cash for the purchase price of the gin plant either on the day of the sale or a few days afterwards?

6. How many days had passed from the time you paid O. Guillory the $7,500 in cash for the gin plant and the time that he paid you the amount of your note?

7. If you answer that O. Guillory owed you a note of some $3000 prior to the purchase of the gin plant from him, why was it that you did not deduct from the price of the gin plant the amount of the note that O. Guillory owed you? Please give in full any reasons you may have had for this apparently unusual transaction.

8. At the time that you claim to have bought the gin plant from O. Guillory was not the firm of O. Guillory & Co. hard pressed for money to carry on their business?

9. Did you not come to Opelousas with O. Guillory on the occasion when you claim to have bought the gin plant from him, and did he not on that occasion sell out to Sam Haas and others?

10. Is not the gin plant which you claim to have bought from O. Guillory a large plant of large capacity and doing at the time an extensive gin business with the general public?

35 11. Have you ever had experience in handling a large gin plant such as the one that you claim to have bought from O. Guillory?

12. Is it not a fact that you will have to depend upon other people who have had the experience in handling such a plant to manage the same for you, or can you say that you have had the necessary experience to manage such a plant yourself?

13. Is it not a fact that the transfer which you claim that O. Guillory made to you of the gin plant was made and executed by

ou in order to assist him as a member of the firm of O. Guillory & 'o. in getting out of their difficulties for the time being?

14. Are you not a farmer and have you not been pursuing the usiness of farming as a means of livelihood all your life?

15. Do you not consider that in paying $7500 for the gin plant hat you gave full value for that property?

16. Is it not a fact that O. Guillory himself is to run this gin plant he coming seasou, or superintend it, and was not this the under-tanding when it was transferred to you?

17. When you came to Opelousas with O. Guillory on the occasion hen he made the transfers of property to Sam Haas and others did ou have any intention of buying the gin plant, or was such inten-ion formed after you arrived at Opelousas on that day?

18. Did not O. Guillory on the above occasion urge and persuade ou to accept a transfer of the gin plant in order to assist him?

19. Had you ever made demand upon O. Guillory for the pay-nent of the $3000 note which you claim that he owed you, before he transfer to you of the gin property?

20. If so, what excuse, if any, did O. Guillory give you for not aying the note before that time?

21. Is it not a fact that on the 7th day of December, 1904, that the firm of O. Guillory & Co. was insolvent as well as the 6 members of the said firm?

22. Was not the only prospect they had of getting out of nsolvency the anticipated rise in the price of cotton after that ate?

23. Where did you get the $7500 in cash to pay O. Guillory for he gin plant, if you state that you actually paid him this amount n cash?

24. If you state that you actually had on hand at the time of he transfer of the gin plant to you as much as $7500 in cash, please tate where you kept that money before that time.

25. If you state that you had to borrow any part of the $7500 to ay O. Guillory for the gin plant, please state of whom you borrowed he money.

26. If you swear that you actually bought and paid for the gin lant, is it not understood between yourself and O. Guillory that you re to sell it back to him when he asks you to do so?

Respectfully submitted,

KENNETH BAILLIO,
W. J. SANDOZ,
Attorneys for Plaintiff.

Filed July 20, 1905.

ALFRED PAVY, *D'y Clerk.*

Oath.

THE STATE OF LOUISIANA, *Parish of Lafayette:*

NEW ORLEANS ACID AND FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

You solemnly swear, that the answers to be given by you to the interrogatories and cross interrogatories to be propounded by me to you in an action now pending before the Hon. E. T. Lewis Judge of the Sixteenth Judicial District Court in and for the parish of St. Landry, State of Louisiana between New Orleans Acid and Fertilizer Co. & *als. vs.* O. Guillory & Co. and *als.* shall be the truth and
37 nothing but the truth So help you God.

Sworn to and subscribed before me this 21st day of July, A. D. 1905.

(Signed) ALEXANDRE MILLER.

(Signed) O. P. GUILBEAU,
Notary Public.

Filed 7/22/1905.
ALFRED PAVY, *Dy Clerk.*

THE STATE OF LOUISIANA, *Parish of Lafayette:*

To the Hon. Sixteenth Judicial District Court in and for the Parish of St. Landry, La.:

As per annexed commission from your Hon. Court and after having notified the within name- Alexandre Miller and after having sworn him according to law the said witness ALEXANDRED MILLER answer the interrogatories and cross interrogatories as follows:

Interrogatory No. 1. My name is Alexandre Miller. I am 44 years of age. I reside near Eunice in St. Landry Parish. I am a farmer.

No. 2. I have known him about ten years. I married his daughter.

No. 3. I purchased a cotton gin from him.

No. 4. Yes, I paid cash the same day.

No. 5. He was owing me $3000.00 and paid me after the purchase or sale of the gin.

No. 6. I have paid $7,500.00 for the gin and land in question cash on the same day of the sale.

No. 7. At the time that Mr. Guillory sold me the gin in question I bought it because I then thought and still believes that I was making a good deal. I did not know that he was insolvent and did not do it with the intent of defrauding any body had I known it I would not have bought the gin.

No. 8. On the 7th day of December 1904 I went in the same buggy or vehicle to Opelousas with Mr. Guillory the man above

named his wife and myself the object of my visit to Opelousas
8 that day was to pay my taxes—which can be shown by my
tax receipts—while there I happened to be with Mr. Guillory,
Ir. Sam Haas, when Mr. Guillory offered Mr. Hayes to *sale* him the
iin in question. I answered Mr. Hayes let us buy it in partnership
e refusing on the ground that his money was tied up. Mr. Guillory
ddressed to me saying you buy it you have the money. I took it
nmediately because I thought it was a good deal. I did not pay
ash right then because my money was at home but on the same
ay we returned and I paid cash $7,500.00. I paid him at his own
ouse.

Cross interrogatories to be propounded to the witness ALEXANDRE MILLER, one of the defendants, and to be answered under oath under the attached commission.

Answers.

No. 1. Mr. Guillory was owing me. I held a note against him.
No. 2. He was owing me for cash money loaned him. He is not
ne only man I loaned money to.
No. 3. Between the 8th and 15th of December, 1904.
No. 4. My answer above ought to show a few days after.
No. 5. On the same day of the sale.
No. 6. Refer to answer No. 3.
No. 7. Because at the time of the sale of the Gin my father in law
understand had an immense amount of cotton on hand unsold and
ne cotton and there existed a terrible slump in cotton at the same
me and he told me that in order to keep his cotton until advance
rices he was in need of all the money and as I had loaned him the
3000 on his simple note I did not fear to wait for him hence I gave
im the whole amount.
No. 8. If they were I am not or was not aware of it.
No. 9. I believe that he did *sale* some property to Haas & *als.* I
now that I came to Opelousas with him.
No. 10. Why, yes it is a fine plant doing at that time good
0 business—that is why I bought it.
No. 11. I must admit that I had no large knowledge in
inning business I thought that having in the past succeeded to my
tisfaction in all my enterprises I could pull through and make
oney in that one.
No. 12. When I bought the Gin outfit in question my intention
as to be my own manager believing that I was fully competent to
anage it even up to two months ago I entertained the same idea,
ut now I am under treatment for a case of almost total blindness
nd unless my eyes sight comes back soon I will have to make ar-
angements with some one whom I have not yet thought of to run
nd manage it for me—but in case I am better in time I will do it
yself and nobody else.
No. 13. No, sir. It is not a fact.
No. 14. Yes.
No. 15. I believe that the gin plant was not sacrificed at $7500,

but I would not take any less than $8500 for it today notwithstanding perhaps my inability to run it myself.

No. 16. No, sir—there was never any such understanding and I have not up to this date made any arrangements with Mr. O. Guillory nor any body else to manage or be the superintendent of my gin plant.

No. 17. I did not come with the intention of buying that property refer to my answer in interrogatory No. 8.

No. 18. No. I bought it in a short while without any urging.

No. 19. No, sir, I had made no demand.

No. 20. No demand—hence no excuse.

No. 21. Not to my knowledge.

No. 22. I certainly cannot answer that question, but to say I do not know.

No. 23. At my own home.

No. 24. I have some more money at home but nobody will know where I keep it I am under oath and swear that I had that money at home and swear that I have some more.

No. 25. I did not borrow it I had it myself and have some more.

No. 26. No. No such understanding. I will *sale* the gin to Mr. Guillory or anybody else for $8500—no less.

I do most solemnly swear that I have answered all questions propounded to me to my best knowledge and ability So help me God.

Sworn to and subscribed before me this 21st day of July A. D. 1904.

(Signed) ALEXANDRE MILLER.

(Signed) O. P. GUILBEAU,
Notary Public.

I, O. P. Guilbeau Notary Public, in and for the Parish of Lafayette, La., do hereby certify that Alexandre Miller the within named witness personally appeared before me on the 21st day of July, 1905 and was by me first duly sworn to testify the truth, the whole truth and nothing but the truth.

That the following deposition was reduced to writing by me and by said witness.

Subscribed in my presence on the 21st day of July A. D. 1905.

(Signed) O. P. GUILBEAU,
Notary Public.

Filed 7/22/05.
ALFRED PAVY, *D'y Clerk.*

Note of O. Guillory in Favor of Alexandre Miller, Etc. "AA."

$3000.00. EUNICE, LA., *January* 18, 1904.

On demand, after date, I promise to pay to the order of Alexandre Miller Three Thousand no-100 Dollars, at — on deposit. Value received.

(S'g'd) O. GUILLORY.

No. —. Due ——.

Endorsed on back: 12/12/04. Received payment (S'g'd) Alexandre Miller.

41 A true copy.

PAUL W. LAFLEUR, *D'y Clk.*

Filed July 26/'05.

[SEAL.]

PAUL W. LAFLEUR, *D'y Clerk.*

Extract Minutes Saturday, July 29, A. *A.* 1905.

Court met pursuant to adjournment.
Present as before.

No. 17415.

N. O. ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

The commission, for the introduction of which this case was left open, not having been returned within the delays, on motion of plaintiffs' counsel, it is ordered the note of evidence be closed and the case submitted without argument.

Bill of Exception In re Testimony of Alexandre Miller.

District Court, St. Landry Parish, La.

No. 17415.

N. O. ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

Be it remembered that on the trial of the above cause counsel for Alexandre Miller offered to introduce in evidence the depositions of said Alexandre Miller taken in his own behalf under commission before O. P. Guilbeau, Notary Public, when the plaintiffs objected to the introduction of the same on the following grounds, to-wit:

First, that the procès verbal of the officer does not show that the answers of the witness were taken down as given him, nor that the interrogatories had been read to him before or at the time his answers were given;

Second, that the procès verbal of the Notary recites that the depositions were written by him and the witness himself, who is a party to the suit, this appearing from the following two paragraphs in the procès verbal of the Notary, as follows (*verbatim et literatim*):

42 "That the following deposition was reduced to writing by me and by said witness

"Subscribed in my presence on the 21st day of July A. D. 1905"

—this being contrary to law, and making the whole of the depositions inadmissible as evidence.

But said objections were overruled by the Court for the following reasons, viz:

First. Because the procès verbal shows when, where and by whom the commission was executed and that the witness was duly sworn, which, in the opinion of the Court, is sufficient in law.

Second. Because the court's reading of the clause of the procès verbal quoted is entirely different from that of counsel for plaintiff. The court's reading of the clause in question is "That the deposition was written by the notary and subscribed before him by the witness on July 21st, 1905." Besides the Court takes cognizance that the deposition is entirely written in the same handwriting which corresponds with that of the signature of the notary and is entirely different from that of the signature of the witness. In the absence of countervailing proof, the court is bound to adopt the presumption *omnia rite acta.*

To which ruling of the Court counsel for the plaintiffs excepted, and accordingly tender this bill of exception, which is read and signed in open Court before judgment, after having been submitted to opposing counsel.

(S'g'd) E. T. LEWIS, *Judge.*

Filed July 31, 1905.
PAUL W. LAFLEUR, *D'y Cl'k.*

Bill of Exception In re Eunice Mer. Co., etc.

43 District Court, St. Landry Ph., La.

No. 17415.

N. O. Acid & Fertilizer Co. et als.
vs.
O. Guillory & Co. et als.

Be it remembered, that on the trial of this cause the plaintiffs' counsel offered to introduce in evidence the following documents namely:

First, certified copy of act of incorporation of the Eunice Mercantile Co., Ltd., together with the certificate of registry of same, as also the publication thereof in the Eunice "Gall" newspaper published, at Eunice, St. Landry parish, La.;

Second, certified copy of act of sale from U. Mayo Miller to Alexandre Miller, of date Dec. 14th, 1901, together with certificate of registry of the same;

When said evidence was objected to by counsel for the defendants in this suit on the ground that the same were irrelevant and inadmissible;

And the Court having sustained said objections, counsel for the plaintiffs excepted to said ruling, and accordingly tender this bill of exception, which was read and signed in open court before judgment, and by permission of the Court and with the consent of op-

posing counsel, the said two documents offered are annexed to and made a part of this bill of exception, the same being signed on this 31" day of July, A. D. 1905.

(Signed) E. T. LEWIS, *Judge.*

Filed July 31, 1905.
PAUL W. LAFLEUR, *Dy Clk.*

STATE OF LOUISIANA, *Parish of St. Landry:*

44 Be it Known, That on this Fourteenth (14th) day of the month of December in the year of our Lord, One Thousand Nine Hundred and One before me, Edward Dardeau, a Notary Public, duly commissioned, qualified and sworn, in and for the parish and State above written, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared U. Mayo Miller, a resident of Prairie Faquetaique, St. Landry parish, La., who declares that for, and in consideration of, the sum and price hereinafter set forth he does by these presents, grant, bargain, sell, convey, transfer, assign and set over with full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other incumbrances whatsoever, and *q*ith subrogation to all his right and actions of warranty against all previous owners, and with full guarantee of title unto Alexandre Miller, also a resident of same prairie, parish and State aforesaid, here present, purchasing and accepting for himself, heirs and assigns, and acknowledging delivery and possession thereof, the following described property, to-wit:

A certain tract of prairie land, situated in Prairie Faquetaique, Saint Landry parish, La., bounded north by lands of Orter Fruger, south by public road, east by lands of Ernest Fruger, Jr., and west by lands of Rodolphe Savoie, containing one hundred and eighty arpents, more or less, together with all the buildings and improvements thereon; being the same property acquired of Ursin Miller, on January the 4th, 1892, per act before Eugene H. McGee, Notary Public.

This sale is made and accepted for and in consideration of the price and sum of Two Thousand Dollars, in part payment and deduction whereof the said purchaser has paid at the execution hereof in cash, current money, to the vendor the sum of One Thousand Dollars, the receipt whereof is hereby acknowledged, and full
45 acquittance and discharge granted, and for the balance of the said purchase price said purchaser has executed a certain promissory note for the sum of One Thousand Dollars, and made payable on the first day of June, Nineteen Hundred and Two, drawn to the order of U. Mayo Miller, dated December 14th, 1901, and made payable as aforesaid, and bearing interest at the rate of eight per cent. per annum from maturity until paid, which said note, after having been paraphed "*Ne Varietur*," for identity herewith was delivered to said vendor, who acknowledges receipt of same.

Now, in order to guarantee the full and final payment of said note and interest, and attorney's fee hereinafter mentioned, special mort-

gage and vendor's lien and privilege are hereby retained on said property in favor of U. Mayo Miller and that of all future holder or holders of said note; the said purchaser obligates himself not to encumber or alienate said property to the prejudice of this act.

And in the event of suit to recover payment of said note or any part thereof, the said purchaser obligates himself to pay to the holder or holders of said note, attorney's fee fixed at ten per cent. on the amount sued for. Contracting parties dispense me, Notary, from the production of the Certificate of Mortgage required by law.

The taxes on this land are paid for the year 1901.

Done and passed at Ursin Miller's residence on the day, month and year aforesaid, in the presence of Robert Lafleur and Ursin Miller, competent witnesses, who have signed with the appearers and me, Notary, after reading the whole.

U. MAYO MILLER.
ALEXANDRE MILLER.

Witnesses:
R. LAFLEUR.
U. MILLER.

EDWARD DARDEAU,
Notary Public.

Filed 12/27/1901.
A. LEON DUPRE, *Dy Clk.*

46 No. 47229.

Mortgage Sale.

U. Mayo Miller to Alexandre Miller, Dec. 14, 1901.

Edward Dardeau, Notary.

STATE OF LOUISIANA, *Parish of St. Landry:*

I hereby certify that the within and foregoing is a true and correct copy of original act No. 47229, on file and of record in my office in Mortgage Book 39 A. p. 128, and in Conveyance Book X No. 34 p. 273, of date Dec. 27, 1901.

Witness my hand and the seal of my office, at Opelousas, La., this 31st day of July, A. D. 1905.

L. A. SANDOZ,
D'y Clk, 16th Jud. Dist. of La.

Filed July 31/05,
PAUL W. LAFLEUR, *D'y Clk.*

Extract Minutes, Monday, July 31st, A. D. 1905.

Court met pursuant to adjournment.
Present as before.

No. 17415.

N. O. ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

Judgment, see decree.
Motion for a new trial submitted and overruled.
On motion of plaintoffs' counsel, a devolutive appeal is granted them to the Supreme Court of Louisiana, returnable within sixty days upon their furnishing bond in the sum of two hundred and fifty dollars.

Judgment.

16th Judicial Court, St. Landry Parish, La.

No. 17415.

N. O. ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & COMPANY ET AL.

47 This is a suit by the New Orleans Acid & Fertilizer Company, the Canadian Mill & Elevator Company, and Morris McGraw Woodenware Company, in which petitioners claim judgment against O. Guillory & Company, a commercial co-partnership composed of Olivrel Guillory, Olivrel E. Guillory and Ambroise Lafleur, and the individual members thereof, *in solido*, in the following sums, to-wit: the said New Orleans Acid & Fertilizer Company in the sum of Three Thousand Two Hundred and Forty and 50-100 Dollars ($3240.50) with eight per cent. per annum interest thereon from May 1st, 1904, until paid, and ten per cent. additional on the amount of principal and interest for attorney's fees; the said Canadian County Mill & Elevator Company in the sum of Six Hundred and Thirty-six and 33-100 Dollars ($636.33), with eight per cent. per annum interest thereon from June 14th, 1904, until paid; and the said Morris McGraw Woodenware Company in the sum of Two Hundred and Sixty and 51-100 Dollars, with legal interest from Judicial demand, to-wit, February 6th, 1905.

The demand of said petitioners for said money judgments was coupled with the further demand that certain transfers alleged to have been made by said O. Guillory & Company and the said O. Guillory in December, 1904, to Samuel and John A. Haas, Alexandre Miller, Francois E. Savoy and Joseph Aurelien Fontenot, be declared simulated, and if not simulated, then fraudulent, and the property transferred subjected to seizure and sale to pay and satisfy said claims of said plaintiffs.

Certain exceptions were filed by the defendants Samuel and John A. Haas which it is unnecessary to discuss here. Subsequently, all parties defendant, including said transferees, pleaded the general issue. Some time thereafter William J. Sandoz, alleging that the said O. Guillory & Company had been adjudged bankrupts in the District Court of the United States for the Western District of Louisiana, and that he had been appointed trustee of the bankrupt
48 estate, prayed to be made a party to the suit and to prosecute the same for the benefit of the bankrupt estate in his capacity as trustee.

The case was regularly fixed and proceeded to trial. The proof showed to the satisfaction of the court that O. Guillory & Company was indebted to the original plaintiffs in the respective sums claimed by them. The Court, however, is of the opinion that the evidence fails to show that the sales or transfers attacked were either simulated or fraudulent; that it fails to show that the said O. Guillory & Company was insolvent at the time of said transfers and that the transferees knew of the insolvency. The Court is of the opinion on the other hand, that the evidence affirmatively shows that the transfers were not simulated; that the sums respectively mentioned as the considerations therefor were actually paid and that said considerations were fair and adequate prices for the properties transferred, and that therefore, plaintiffs have utterly failed to sustain the attack levelled against said transfers.

Since the claims of the plaintiffs are such as would be released by a discharge of the bankrupts, the court cannot grant absolute judgment in their favor until the court of bankruptcy shall have passed upon the application for a discharge, if any such has been filed, or until the expiration of the time within which the same may be filed. For these reasons, and because the law and the evidence are in favor thereof, it is

Ordered, adjudged and decreed, That plaintiffs' demand to have the transfers above mentioned set aside, either as simulated or fraudulent, be rejected at their costs and their right to a money judgment against O. Guillory & Company and the individual members of said firm, be stayed in accordance with the provisions of Section 11 of the Bankruptcy Act of 1898 of the United States.

49 Done, read and signed in open Court, at Opelousas, Louisiana, this 31st day of July A. D. 1905.

(Signed) E. T. LEWIS,
Judge 16th Judicial District of La.

Filed July 31st, 1905.

PAUL W. LAFLEUR, *D'y Clerk.*

Motion for a New Trial.

16th District Court, St. Landry Parish.

No. 17415.

N. O. ACID & FERTILIZER CO.
vs.
O. GUILLORY & CO. ET AL.

Now come plaintiffs in above cause into open Court, and respectfully suggesting that the judgment of the Court is contrary to the law and the evidence, respectfully pray for a new trial of above cause, for costs, and for general relief.

(Signed) W. J. SANDOZ,
" KENNETH BAILLIO,
Att'ys for Movers.

Filed July 31, 1905.
PAUL W. LAFLEUR, *D'y Clerk.*

Bond of Appeal.

STATE OF LOUISIANA, *Parish of St. Landry:*

District Court Parish of St. Landry.

No. 17415.

N. O. ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

Know all men by these presents, That we William J. Sandoz, Trustee, as principal, and William J. Sandoz, as security, are held and firmly bound unto Yves Andrepont, Clerk of Court, his heirs executors, administrators, and assigns, in the sum of Two
50 Hundred and Fifty and no-100 Dollars, and for the payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents. Dated the Seventh day of August, A. D. Nineteen Hundred and Five.

Whereas, the above bounden William J. Sandoz, Trustee, has applied for and been granted a devolutive appeal from a certain final judgment rendered against him in this District Court in and for the parish of St. Landry, in favor of O. Guillory & Co. *et als.* in suit Number 17415, the Docket of said Court, entitled N. O. Acid & Fertilizer Co. *et als. vs.* O. Guillory & Co. *et als.;*

Now, therefore, the condition of the above obligation is such, that if the said William J. Sandoz, Trustee, shall prosecute this devolutive appeal, and shall satisfy whatever judgment may be rendered against him or if the same shall be satisfied by the proceeds of the sale of his estate, real and personal, if he be cast in the appeal, then

and in that case the above obligation to be void and null, otherwise the said security shall be liable in his place.

(Signed) WILLIAM J. SANDOZ,
Trustee Estate O. Guillory & Co., Bankrupts.

Clerk's Office, District Court, Parish of St. Landry.
(S'g'd) W. J. SANDOZ.

Filed August 7, 1905.
PAUL W. LAFLEUR, *Dy Clerk.*

Certificate of the District Court Clerk.

STATE OF LOUISIANA, *Parish of St. Landry:*

I, the undersigned, Clerk of the Sixteenth Judicial District Court, in and for the above Parish and State, do hereby certify, that the within and foregoing — pages do contain a true and correct Transcript and copy of all documents filed, proceedings had, and testimony adduced, in the suit entitled New Orleans Acid & Fertilizer Co. *et als. vs.* O. Guillory & Co. *et als.*, No. 17415, of the Docket
51 of said Court.

In Witness Whereof, I have hereunto affixed my official signature and the Seal of my Office, on this, the 14th day of October, A. D. 1905.

YVES ANDREPONT,
Clerk 16th Jud. Dist. Court of La.

52 PROCEEDINGS HAD IN THE SUPREME COURT OF THE STATE OF LOUISIANA.

Motion and Affidavit for Time to File Record.

Supreme Court, State of Louisiana.

No. 17415.

N. O. ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & CO. ET AL.

Appeal from the District Court, St. Landry.

Upon motion of the undersigned counsel for the plaintiffs and appellants, and upon suggesting to the Court that the Clerk of the District Court will require additional time within which to complete and file*d* the Transcript of Appeal, in this case, as per his affidavit hereto appended, it is ordered, adjudged and decreed that the return day for filing the appeal Transcript be extended for thirty days.

(Signed) W. J. SANDOZ,
(Signed) KENNETH BALLIO,
Att'ys for Plaintiffs and Appellants.

Filed Sept. —, 1905.
—— ——, *Clerk.*

STATE OF LOUISIANA, *Parish of St. Landry:*

Before me, the undersigned authority, personally came and appeared Yves Andrepont, Clerk of the sixteenth Judicial District Court in and for the parish of St. Landry, who declared that he will require additional time to complete the Transcript of Appeal in the case entitled N. O. Acid & Fertilizer Co. *et al. vs.* O. Guillory & Co. *et al.*, No. 17,415 of the Docket of said Court and suggests that the return day for filing same be extended for thirty days.

(Signed) YVES ANDREPONT,
Clerk Dist. Court.

Sworn to and subscribed before me, this 19 day of the month of September, A. D. 1905.

[SEAL.] (Signed) W. J. SANDOZ,
Notary Public.

53 (Endorsed:) No. 15831. Supreme Court of Louisiana. New Orleans Acid & Fertilizer Co. *et als. vs.* O. Guillory & Co. *et al.* Motion and affidavit for time. Filed, September 21st, 1905. (Signed) Paul E. Mortimer, Deputy Clerk. Entered 6 Nov'r 1905. (Signed) T. McC. Hyman, Clerk.

Entering Motion and Order for Time.

(Extract from Minutes.)

UNITED STATES OF AMERICA, *State of Louisiana:*

NEW ORLEANS, MONDAY, *November* 6, 1905.

This being the first Monday of the month of November, A. D. 1905, and by the Constitution and laws of the State of Louisiana the day appointed for the opening of the Supreme Court of the State of Louisiana, the Court was duly opened by Joseph Demoruelle, Esquire, crier of the Court.

Present their Honors: Joseph A. Breaux, Chief Justice, Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land Associate Justices.

No. 15831.

NEW ORLEANS ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

On motion of W. J. Sandoz and Kenneth Baillio, of counsel for plaintiffs and appellants, and on filing the affidavit of the clerk of the lower court, showing that he will require further time to complete the transcript of appeal in this case; It is ordered by the court that the return day for filing said transcript in this court be extended thirty days.

Agreement to Withdraw Record.

OPELOUSAS, LA., *Nov.* 2, 1905.

54 Hon. T. McC. Hyman, Clerk Supreme Court, New Orfeans.

DEAR SIR: We, the undersigned, counsel for the respective interests in the suit entitled New Orleans Acid & Fertilizer Co. *et als. vs.* O. Guillory & Co. *et als.*, same being on appeal from the 16th Judicial District Court of Louisiana, and bearing the No. 15,831, of the Docket of your Honorable Court, hereby consent and agree that the Transcript of Appeal in the said cause may be withdrawn for the purpose of preparing briefs in the same, with the understanding that the said Transcript shall be returned into your said Court on or before the day of trial.

(Signed) W. J. SANDOZ,
Of Counsel for Plaintiffs, App'lts.
(Signed) E. B. DUBUISSON,
Of Counsel for O. Guillory & Co. and Alex. Miller & F. Savoie.
(Signed) LEWIS & LEWIS,
Of Counsel for J. A. & Sam Haas, Defendant.

(Endorsed:) No. 15,831. Supreme Court of Louisiana. New Orleans Acid & Fertilizer Co. *et als. vs.* O. Guillory & Co. *et al.* Agreement to withdraw record. Filed November 6th, 1905. (Signed) John A. Klotz, Deputy Clerk.

Answer to Appeal.

Supreme Court, State of Louisiana.

NEW ORLEANS ACID & FERTILIZER COMPANY ET AL.
versus
O. GUILLORY & COMPANY ET AL.

To the Honorable Chief Justice and Associate Justices of the said Court:

Now come the defendants, John A. Haas and Samuel Haas and for answer to the appeal they pray:

First. That the judgment of the Lower Court in their favor rejecting the plaintiffs' demands and quieting them in their ownership and possession of the property, the sale of which is sought
55 to be set aside, be affirmed.

Secondly. That should this Court not assent to the judgment of the Lower Court upon the merits, and should be of the opinion that the plaintiffs had a cause of action against them, then in that event they pray this Court to consider and maintained the exception of misjoinder and dismiss the suit as to them upon that ground.

Thirdly. That should this Court assent to neither of the foregoing propositions, and maintain the action of revocation as to them, then

in that event and in the alternative, they pray that they be accorded re-imbursement for the total amount of the purchase price paid, with interest, and

Fourthly. That should they not be accorded re-imbursement of the total amount of the purchase price, as purchasers in good faith, then in that event they pray that they be accorded re-imbursement to the full amount of the mortgage debt existing on the property and which they paid and extinguished.

And they pray for general relief.

(Signed) By Their Attorneys, LEWIS & LEWIS.

(Endorsed:) No. 15,831. Supreme Court of Louisiana. New Orleans Acid & Fertilizer Co. *et als. vs.* O. Guillory & Co. *et al.* Answer to Appeal. Filed Feb'ry 14, 1906, (Signed) T. McC. Hyman, Clerk.

Alternative Prayer to Remand.

Supreme Court, State of Louisiana.

No. 15831.

NEW ORLEANS ACID & FERTILIZER COMPANY
vs.
O. GUILLORY & COMPANY ET AL.

To the Honorable Chief Justice and Associate Justices of the said court:

56 The defendants and appellees, John Haas and Samuel Haas, respectfully represent:

That in the exception filed by them February 13th 1905, transcript page 13, and in that portion of said exception relating to the want of tender, will be found the following statement:

"They further plead in support of this exception that in obedience to the obligation assumed by them in the Act of Sale, they paid the St. Landry State Bank the full amount of the mortgage notes held by the Bank, aggregating $5,000.00, with accrued interest, and bearing as a special mortgage upon the lands purchased by them as aforesaid, and that amount together with the consideration paid by them for the said land should have been tendered them before the institution of this suit.

They now further represent that the said statement in their above mentioned plea, in relation to the aggregate amount that should have been tendered them, is erroneous, the correct amount of the mortgage indebtedness being $6,000.00 instead of $5,000.00 as therein stated.

They further represent that said error was due to the inadvertence of their Counsel in framing said plea, all of which will clearly appear from the cancelled mortgage notes paid by them and the mortgage and Act of sale to them *Act* placed in evidence by the plaintiffs.

Wherefore, they pray that they be not prejudiced by the aforesaid error of their counsel, but that should this Court reverse the finding

of the Lower Court upon the merits and sustain the plaintiffs' revocatory action, then in that event they be accorded the full measure of relief and reimbursement provided for by article 1987 and 1982 of the Revised Civil Code.

But should this court not be fully satisfied from the evidence as to the amount of mortgage indebtedness existing upon the property and extinguished and paid by these Appellees, and in case
57 by the conslusions reached by this court it will consider it necessary to consider that branch of the case, then in that event they pray that the case be remanded for the production of proof as to the full amount of mortgage indebtedness paid and extinguished by them, and which would inure to the benefit of the plaintiffs in case this court should maintain their revocatory action as to these appellees.

And they pray for general relief in the premises.

(Signed) By Their Attorneys, LEWIS & LEWIS.

Affidavit.

Before me Thos. McC. Hyman, Clerk of the Supreme Court, personally came and appeared John W. Lewis, one of the attorneys for John A. Haas and Samuel Haas, in the above numbered and entitled suit, who being sworn according to law, did depose and say:

That the facts and allegations set forth in the foregoing plea are true and correct; and further, that the error and mistake of counsel mentioned therein, was only brought to the attention of himself and associate counsel this day and by the reference thereto in plaintiffs' brief, and that the foregoing plea is presented to this court to obtain substantial justice, and for no other person.

(Signed) JNO. W. LEWIS.

Sworn to and subscribed before me, at the City of New Orleans, this 14th day of February A. D. 1906.

[SEAL.] (Signed) T. McC. HYMAN,
Clerk Supreme Court Louisiana.

(Endorsed:) No. 15,831. Supreme Court of Louisiana. New Orleans Acid & Fertilizer Co. *et als. vs.* O. Guillory & Co. *et al.* Alternative Prayer to Remand. Filed Febr'y 14, 1906, (Signed) T. McC. Hyman, Clerk. Admitted in open Court by W. J. Sandoz, attorney for — that the within party claimed $6000.

58 *Continuance.*

NEW ORLEANS, WEDNESDAY, *February 14th*, 1906.

The court was duly opened pursuant to adjournment.

Present: Their Honors Joseph A. Breaux, Chief Justice; Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices.

No. 15831.

NEW ORLEANS ACID & FERTILIZER COMPANY ET ALS.
vs.
O. GUILLORY & CO. ET AL.

This cause was ordered by the Court to be continued until tomorrow, Thursday, the 15th day of February instant.

Cause Called, Argued, and Submitted.

NEW ORLEANS, THURSDAY, *February 15th*, 1906.

The Court was duly opened pursuant to adjournment.

Present: Their Honors Joseph A. Breaux, Chief Justice; Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices.

No. 15831.

NEW ORLEANS ACID & FERTILIZER COMPANY ET ALS.
vs.
O. GUILLORY & CO. ET AL.

This cause came on this day to be heard and was argued by counsel: Mr. William Joel Sandoz, opened for the plaintiffs and appellants; Mr. Thomas Hardeman Lewis replied on behalf of Samuel Haas and John A. Haas, defendant and appellees; and was followed by Mr. Edward Benjamin Du Buisson, on behalf of O. Guillory & Co., Alexander Miller and F. E. Savoy, also defendants and appellees; and Mr. Kenneth Baillio, on behalf of the plaintiffs closed the argument. The court then took the cause under advisement upon the briefs now on file for the respective parties in interest.

59 *Judgment.*

(Extracts from Minutes.)

NEW ORLEANS, MONDAY, *March 26th*, 1906.

The Court was duly opened pursuant to adjournment.

Present: Their Honors Joseph A. Breaux, Chief Justice, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices. Absent: Francis T. Nicholls, Associate Justice.

His Honor Mr. Justice Provosty pronounced the opinion and judgment of the Court in the following case.

No. 15831.

NEW ORLEANS ACID AND FERTILIZER COMPANY ET ALS.
vs.
O. GUILLORY & CO. ET AL.

Appeal from the 16th Judicial District Court, Parish of St. Landry

It is therefore ordered, adjudged and decreed that the judgment appealed from in so far as it dismisses the plaintiffs' suit against Francois E. Savoie, be annulled and set aside and that the plaintiff now have judgment against the said Francois E. Savoie setting aside as simulated the sale made to him by Olivrel Guillory on the 8th day of December, 1904, of the following described property, to-wit:

"Three quarters of lot 1 and the whole of lot 2 in Block 12, in Eunice, La., together with all the buildings and improvements thereon; also lots 7 and 8, Block 5, in Eunice, La., together with all the buildings and improvements thereon.

¾ of lot 1, block 12 acquired by vendor from Gus Fusellier, and lot 2 block 2 acquired by exchange with O. Guillory, Jr., and lots 7 and 8 block 5 acquired by vendor from J. J. Lewis," and for the costs of this suit in so far as occasioned by that part of the suit relating to the said Savoie and that in all other respects the said judgment be affirmed.

60 *Opinion.*

MONDAY, *March 26th*, 1906.

Mr. Justice Provosty.

No. 15831.

NEW ORLEANS ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET AL.

Appeal from the 16th Judicial District Court, Parish of St. Landry, E. T. Lewis, Judge.

This suit is brought to set aside as simulated, or, at any rate, fraudulent, three sales made to the three defendants, separately, by O. Guillory, a member of the mercantile firm of O. Guillory & Co., whereof plaintiffs are creditors.

The allegations are the usual ones of indebtedness, insolvency, the making of the sale for the purpose of defrauding creditors or giving an unfair preference to some of them. Also that the price was less than four fifths of the real value.

At the time of the sales, 7th and 8th December, 1904, O. Guillory & Co., was a going mercantile firm at Eunice, La., composed of O. & O. E. Guillory and Ambroise Lafleur. The firm was holding

a large amount of cotton and there had been recently a slump in the cotton market. O. E. Guillory and Ambroise Lafleur had no individual property. O. Guillory had 806 acres of prairie land, usually cultivated in rice. The land was well fenced and had some houses or cabins on it. He had also a steam cotton gin in the town of Eunice with the lot or lots on which it stood; also another lot having on it the store building in which the firm carried on its business, and a small dwelling house. In the October preceding, the firm had written to one of the plaintiffs, asking indulgence, and representing that its indebtedness was $7000., as against $20,000. of assets.

On December 7th 1904, O. Guillory and his wife and the defendant Alexander Miller, who is their son-in-law and live just
61 outside of Eunice, came together in a carriage from Eunice to Opelousas, the parish seat, a distance of 30 miles. On that day Guillory sold the 806 acres of land to Samuel and John A. Haas for $2000. cash, plus the assumption of a mortgage of $6000., and interest, resting on the property and represented by three notes. Samuel Haas lives at Bayou Chicot, 35 miles from Eunice; and John A. Haas, at Opelousas, which, as just stated, is 30 miles from Eunice. Samuel Haas and John A. Haas are father and son and men of large means, who to some extent make a business of buying lands cheap when opportunity offers, and holding for higher prices.

On the same day, and before the same notary, Guillory sold to Alexander Miller for $7,500., cash, the steam cotton gin and the lot or lots on which it stood. Miller says that after the sale of the land had been consummated, Guillory offered to sell to the Haases the steam cotton gin, and that they declined to buy, and that thereupon he, Miller, proposed to them that he and they make the purchase together, and they declining, he bought it himself. He says the object of his coming to Opelousas that day was to pay his taxes. He says, further, that they drove back to Eunice the same day, and that he, the same evening, went to his house and got the $7,500., and paid it to Guillory. At the time of this sale, Miller held the past due note of Guillory for $3000. He says Guillory paid him this note on the 12th, a few days after the sale. Miller is a farmer without education, but, admittedly, a man of considerable means, all of his own making. The witness put upon the stand by plaintiff to prove he could not have had at his house, or readily procured without giving security, so large a sum as $7,500., proved rather the opposite. Miller says he would not have bought the property if he had thought Guillory was making the sale for the purpose of defrauding his creditors; that he knew Guillory was holding an immense amount of cotton, and that there had been a terrible slump in the price of cotton, and that Guillory told him that in order to keep this cotton he needed all
62 the money he could get. That this was the reason why he did not deduct from the $7,500., the amount of his note.

On the next day, December the 8th, Guillory sold the store building and the small dwelling house and the lot or lots on which they stood to Francois E. Savoie for $3,500, cash. The sale was made before the local notary Mr. Dardeau. Savoie lives about six miles

from Eunice. He is a farmer and stockraiser, uneducated. He can not tell what properties he now owns. He owns he says "about fou or five hundred acres of cultivable land, or maybe eight hundred on which he has seven families. He says he owns, as we understand in addition, 500 arpents in pasture land. Also in Eunice one acr of unimproved land which cost him $200., and two improved lots He admits that he is a debtor on a number of notes for smal amounts secured by vendor's privilege on different tracts of lan bought by him at different times upon which he is paying interes at 8 per cent. and upon which he has been obtaining extensions.

The notary before whom the act of sale was passed testifies as fol lows:

"Mr. Savoy pulled out a roll of bills after the sale. It looked t me like a roll of bills of five thousand dollars. He unrolled it an counted—he said 'I want you to count it.' I counted the money Mr. Olivrel Guillory was standing by me and counted the sam money right behind me. There was one thousand dollars in it. said, 'There is lacking two thousand five hundred dollars, what wil you do about it?' Mr. Olivrel said he will give me a due bill or a note payable in eight or ten days, as he wants. Mr. Savoy answered 'I will pay you within three days,' so I made the note payable on day after date for the sum of twenty five hundred dollars with inter est at the rate of eight per cent. from date."

Savoie testifies he had the other $2500. in his house and paid i the next day. Touching the source of the money he testifie
63 as follows:

"I had collected different sums, eight hundred and fift dollars for some cattle that I sold for my mother-in-law. I also kep a little market and collected from five to six hundred dollars, an then besides that I sold to the butchers a considerable amount tha I don't remember that I have marked down at home. I can't mark it myself but I have it marked."

"Q. Mr. Savoy, was it from these collections that you have men tioned that you realized the money to pay Mr. Guillory?

"A. Not absolutely that. I had other money. It was mixed wit other money.

"Q. Can't you give us a statement of where you got the money aside from these collections that you have mentioned?

"A. I could have it at the house.

"Q. Where did you get the money which you claim to have had at your house?

"A. From working and traffic-ing."

He says further that he has been in possession ever since. "I bought in December, and in January I commenced to collect rent We fix the price at $30., a month right after the sale." He does no say whom besides himself, he means by we; but a little later in his testimony he says that the store is not occupied now, but has been retained, and he is getting his rent all the same. That O. E. Guil lory, of the firm of O. Guillory & Co., representing to him that he was acting for other people, asked him the preference on the store and that he gave it to him. That Johnny White wanted to rent the

dwelling house but "I told him I had left it with O. E. Guillory to rent for me and to see him about it." That this house is rented, and that he got at first $5. rent but now is getting $6. He does not say to whom. He further testified as follows:

"Q. Who is it that is to occupy that store from now on?

"A. Yves Guillory asked me the preference on the store, and I told him he could have it; he told me that he was represent-
64 ing other people.

"Q. When you say Yves Guillory, you mean O. E. Guillory, member of the old firm of O. Guillory & Company?

"A. Yes I mean O. E. Guillory of the firm of Guillory & Company.

"Q. Do you know who composes the firm who is to run that business?

"A. I know the names of one or two who are to occupy the store.

"Q. Who are they?

"A. Theodule Guillory, Pierre Guillory and one of the Lafleurs and perhaps myself.

"Q. What relation are Pierre Guillory and Theodule Guillory to O. Guillory?

"A. Brothers.

"Q. What relation is Lafleur, Henry Lafleur, with Ambroise Lafleur who was a member of the same firm of O. Guillory & Company?

"A. I don't know what relation they are. I don't know how nearly related they are."

The parties here referred to are the charter members of a limited company organized in July 1905 under the name of Eunice Mercantile Company, Limited, for the declared purpose of carrying on a mercantile business at Eunice. One of the charter provisions is that the affairs of the company shall be conducted by a manager, who shall be authorized to sue and upon whom process shall be served, and that until otherwise provided O. E. Guillory shall be manager.

Whether at the date of the sales the firm of O. Guillory & Co. had disposed of the cotton it had been holding theretofore, is not shown by the record. However, on the 13th of December, five days after the sales, it wrote to one of its creditors that owing to the recent slump in the price of cotton it was not able to meet its obligations which were $18,403.41 as against $7000., of assets. On January 9th, 1905, it wrote to the attorneys of the same creditors stating that its case was one of "plain loss and ruin," and offering a settle-
65 ment at 25 cents on the dollar, and submitting the following statement:

	"Oct. liabilities.	Oct. assets.
	$7943.00	$19687.00
W. B. Thompson & Co. since for cotton.....	42000.00	
This cotton sold for	.....	36382.00
F. Gumbel & Co., since for cotton.....	1090.00	
Collections invested in cotton	17000.00	
	$68033.00	$56069.00
	56069.00	
	11964.00	
Our present assets remaining from our original 19687.00.....	6645.00	
	18609.00	
Liab.....		$18609.00
Assets.....		6645.00"

On April 28th, three months after the sales, the firm made a surrender in bankruptcy. The debts are put down at $18,629.34. The schedule B showing whether there were any assets was not offered in evidence.

Counsel for plaintiffs say that the embarrassed condition of the firm had been a topic of public comment and conversation in the neighborhood. But the only evidence referred to in support of that statement is the testimony of the notary, Mr. Dardeau, before whom the sale to Savoie was passed, which testimony is, as follows:

"Mr. Dardeau, did you know of the embarrassed circumstances of Guillory & Company about the time that they sold this property to different people?

"A. Heard talking among the neighbors.

"Q. It was generally understood in that neighborhood that there was something the matter then, I believe, was it not?

"A. Yes, but I pay so little attention to what I hear. Unless
66 I am perfectly satisfied or know something about the business, I pay little attention.

"Q. What you heard of it was gotten from general talk?

"A. Yes, general talk, and people that understood nothing about business. Only some of my neighbors going to town and making reports.

"Q. To what effect were those reports?

"A. That he had bought cotton at a high price and cotton going down it put him in a straight; that he couldn't possibly pay all his debts right away.

"Q. Was it not already talked about that the firm was in failing circumstances?

"A. No sir, they didn't talk about his failing then. Some persons supposed he was selling to settle."

This last answer would indicate that the neighborhood talk in question might have been after the sales had taken place; caused, perhaps, by the sales themselves. But granting that it was before

the sales, it does not necessarily show anything more than that the firm was carrying a large quantity of cotton and that the fall in the price of cotton put the firm in a position not to be able to pay "all its debts right away." The Haases, living 30 miles away, could not be presumed to have heard this neighborhood talk. Miller denies having known of the insolvency of Guillory. Savoie was not questioned on the subject.

Plaintiffs say in their brief that the $13,123.41 realized by Guillory from the three sales was enough, added to the other assets, to pay within a few hundred dollars the entire indebtedness of the firm. If so, it is not so clear that Guillory was insolvent before the sales. What made him insolvent was the selling of the property and the pocketing of the proceeds. But that was a condition brought on by the sales and existing only after they had been made. Guillory individually is not shown to have owed a dollar, apart from the $3000. note to his son-in-law Miller, and the $6000.
67 mortgage assumed by the Haases.

Counsel for plaintiffs attach great significance to the fact that neither of the Haases went on the witness stand, although one of them, or possibly both, attended the trial throughout. But why should they have gone on the stand until plaintiffs had proved something against them. Plaintiffs had contented themselves with alleging much against them and proving absolutely nothing.

Even if it were granted that Guillory was insolvent "within a few hundred dollars" at the time of the sale,—there is absolutely no proof whatever that the Haases knew it. And even if they had known that upon a full and final settlement of his affairs, including the affairs of the firm, Guillory would have been minus a few hundred dollars, would that knowledge have stood in the way of their purchasing from Guillory his plantation in perfect good faith. We think not.

It is not, as contended, when simulation has been "charged" that the burden of proof shifts to the defendant, but "when facts are shown, sufficient to throw doubt upon the reality of the sale." King *vs.* Atkins, 33 Ann. 1057. At the time the Haases made their purchase, O. Guillory & Company was a going concern, whose insolvency no one can be presumed to have known; and O. Guillory himself was the owner of considerable property, unencumbered, excepting the $6000. mortgage assumed by the Haases.

Counsel say that the acts of sale were not offered in evidence by defendants, but only by plaintiffs, and that plaintiffs' offer was restricted to the proof of *rem ipsam;* and that therefore the acts are not evidence of payment of the price, nor of delivery of possession. The restriction to *rem ipsam* cannot go to that extent. It means no more than that the party offering the document does not vouch for the verity of its recitals and does not intend to be bound thereby. But the court cannot shut its eyes to the recitals of the document and to the fact that it is authentic and that therefore it is accompanied by delivery.

68 Plaintiffs would prove up their case against Miller out of the mouth of Miller himself. Miller says he had the $7500.

in cash at his house, and in that statement he is confirmed by Lewis, and we might add by plaintiffs' own witness Meyer. Counsel think it next to incredible that Miller could have made the trip to Opelousas and back and passed the act of sale and gone to his home and got the money and delivered it to Guillory, all in one day, as he says he did. But what is there improbable in the statement; certainly there was ample time to do it in, if the roads were fairly good. Other similarly supposed improbabilities are pointed out in the testimony of Miller: as that he, a farmer and an uneducated man, with no experience in the ginning business, should have consented thus suddenly to make the purchase; that he should not have deducted from the $7,500 the $3,000, which his father-in-law was owing him. The latter circumstance would certainly have been highly suspicious if unexplained; but Miller does explain: "Because at the time of the sale of the gin my father-in-law had an immense amount of cotton on hand unsold and there existed a terrible slump in cotton at the same time and he told me that in order to keep his cotton till advance price he was in need of all the money and as I had loaned him the $3000. on his simple note I did not fear to wait for him, hence I gave him the whole amount."

Again, plaintiffs think that the burden was on Miller to show that Guillory did not continue in possession of the gin. But the sale having been made by authentic act, and the thing sold being an immovable, legal possession accompanied the act; and if, as a matter of fact, the vendor continued in possession, the burden was on the plaintiffs to show it.

We are clear that the sales to the Haases and Miller were genuine transactions made in good faith on the part of the purchasers. The Haases' transaction does not offer grounds even for the slightest suspicion. So far as the Miller sale is concerned the fact that Miller was the son-in-law of Guillory, and especially that he travelled with him that day, furnishes ground for believing that he knew of the embarrassed condition of the affairs of his vendor; but he admits that he did, and explains that he attributed his father-in-law's pressing need of money to the fact that his firm was carrying a large quantity of cotton and that a slump had recently occurred in the cotton market. So far as the record shows, Guillory had up to that time stood well, and the fact that Miller had lent him $3000. on his personal note, shows that he had confidence in him.

69

The transaction with Savoie, however, impresses us differently. In the first place, the description of the property in the act of sale has a suspicious looseness about it. A part of the property sold is described as "three fourths of lot one": without specification as to what particular three-fourths. In the next place there was no change of possession. True, Savoie says that this continued possession was by virtue of a lease entered into "right after the sale"; but this leasing to the vendor is the usual expedient resorted to in cases of simulation where it is inconvenient for the vendor to part with the possession of the property. The only difference in this case is that the lease was probably to the firm, and not to O. Guillory individually. The retention of the property for the use of the limited com-

pany, composed of the two brothers of the Guillorys, and of a Lafleur, relative of the Lafleur who was the third member of the firm of O. Guillory & Co., for the continuation of the same business at the old stand, shows that there was to be no real change of possession.

It is manifest that the same people intended to continue to carry on the same business on the same premises. If so, there is an inherent improbability that O. Guillory would have sold the premises if he could find some complaisant friend under whose name to hide it from his creditors; and it is shown that Savoie had lent himself to just such a transaction on one or more previous occasions.

70 And the improbability is all the greater from the fact that Guillory had his pockets full of cash from the sales of the preceding day and stood in no pressing need of ready money such as might drive a merchant to sell the roof from over the head of his business.

The manner in which the price is said to have been paid furnishes ground for further suspicion and doubt. When a man is going before a notary to pass a cash sale of real estate, and he has the money at his house with which to make the payment, he carries it with him. If the price is to be $3500., he does not take $1000., and trust to luck that the vendor will deliver to him a cash deed to the real estate and take his due bill for the remaining $2500. But if it so happened that he did such a thing, and that the vendor proved willing to take the due bill, he would surely say to his vendor "I have the rest of the money at my house and will get it and turn it over to you at once." He would not say "I will pay you within three days."

To the question of the notary "There is lacking $2500., what will you do about it?" it is Guillory who answers. He volunteers the statement,—hastens, apparently, to make it, without waiting to hear what Savoie has to say,—"He will give me a due bill or a note payable in eight or ten days, as he wants." Had the transaction been a real one, he would have waited to hear what Savoie had to say, and upon being assured by Savoie that he had the money at his house, he would either have required Savoie to go and get it, or, at any rate, would have fixed a much earlier time for the payment than 8 or 10 days.

Savoie declared, on the witness stand, that he would not take $5000. for the property. "Because I don't want to sell it. When I buy property it is to keep it." The reason thus assigned for the unwillingness to sell the property at a profit of $1500. may have been the true one; but judged by common experience, and that is what a court must judge by, it was not. If a man who had bought a piece of property for $3500. refuses to sell it seven months afterwards for $5000., the reason must be that it has increased in value more than the $1500., or that he is actuated by some sentimental

71 motive, or that he has some special need of the property. If in the absence of any of these motives he still refuses to sell it, some other motive must be looked for. The court cannot but suspect very strongly that the motive which actuated Mr. Savoie in

this case was that he was not the owner of the property, and hence could not have sold it at any price.

The account that Savoie gives of how he came to have the $3500., at his house is not over satisfactory. Indeed, the case shows weakness at every point at which simulation usually sticks out.

The testimony of Miller was taken by commission. The procès-verbal of the execution of the commission reads, as follows:

"*Oath.*

THE STATE OF LOUISIANA, *Parish of Lafayette:*

"NEW ORLEANS ACID AND FERTILIZER CO. ET ALS.
vs.
O. GUILLORY ET ALS.

"You solemnly swear, that the answers to be given by you to the interrogatories and cross interrogatories to be propounded by me to you in an action now pending before the Hon. E. T. Lewis Judge of the Sixteenth Judicial District Court in and for the parish of St. Landry State of Louisiana between New Orleans Acid and Fertilizer Co., & *als. vs.* O. Guillory & Co. and *als.* shall be the truth and nothing but the truth So help you God.

"Sworn to and subscribed before me this 21st day of July A. D. 1905.

(Signed) ALEXANDRE MILLER.

"(Signed) O. P. GILBEAU,
Notary Public.

Filed 7/22/1905.
ALFRED PAVY, *Dt. Cl'k.*

"THE STATE OF LOUISIANA, *Parish of Lafayette:*

"To the Hon. Sixteenth Judicial District Court in and for the Parish of St. Landry, La.:

As per annexed commission from your Hon. Court and after having notified the within named Alexandre Miller and after having sworn him according to law the said witness ALEXANDRE MILLER answer- the interrogatories and cross interrogatories as follows:"

Here follow the answers of the witness. The procès-verbal
72 then proceeds:

"I do most solemnly swear that I have answered all questions propounded to me to my best of knowledge and ability So help me God.

"Sworn to and subscribed before me this 21st day of July A. D. 1904.

(Signed) ALEXANDRE MILLER.

(Signed) O. P. GILBEAU,
Notary Public.

"I O. P. Gilbeau Notary Public in and for the Parish of Lafayette La., do hereby certify that Alexandre Miller the within named witness personally appeared before me on the 21st day of July 1905 and was by me first duly sworn to testify the truth, the whole truth and nothing but the truth.

"That the following deposition was reduced to writing by me and by said witness

"Subscribed in my presence on the 21st day of July A. D. 1905

(Signed) O. P. GILBEAU,
Notary Public."

"The evidence was objected to on the following grounds:

"First, that the procès verbal of the officer does not show that the answers of the witness were taken down as given him, nor that the interrogatories had been read to him before or at the time his answers were given;

Second, that the procès verbal of the notary recites that the depositions were written by him and the witness himself, who is a party to the suit, this appearing from the following two paragraphs in the procès verbal of the Notary, as follows: (*verbatim et literatim*):

"That the following deposition was reduced to writing by me and by said witness

"Subscribed in my presence on the 21st day of July A. D. 1905"

—this being contrary to law, and making the whole of the depositions inadmissible as evidence."

"These objections were overruled by the court for the fol-
73 lowing reasons:

"First. Because the procès verbal shows when, where and by whom the commission was executed and that the witness was duly sworn, which, in the opinion of the court, is sufficient in law.

"Second. Because the court's reading of the clause in question is that the deposition was written by the notary and subscribed before him by the witness on July 21st, 1905." Besides the court takes cognizance that the deposition is entirely written in the same handwriting which corresponds with that of the signature of the notary and is entirely different from that of the signature of the witness. In the absence of countervailing proof, the court is bound to adopt the presumption *omnia rite acta*."

This ruling was entirely and evidently correct.

Passing to the contention that the value of the properties exceeded by one fifth the price of the sales, we find that no attempt was made to substantiate that allegation in so far as the Miller sale is concerned and that the proof fails in connection with the sale to the Haases. The price was $8000., plus 8 per cent. interest from February 25th to December 7th, on $6000., say, $376., or a total of $8376. One-fifth of this would be $1675.20. In order to set aside the sale, then, on the ground of inadequacy of price, a value of $10,051.20, or $12.47, per acre, would have had to be shown. Now, if we exclude the testimony of Gus Fontenot, who does not say that lands in that neighborhood are worth $20. per acre, (as plaintiffs would have it that he says), but that he does not know what they are worth, only he would

not take $20., for his own in that neighborhood; and if we average the other witnesses, according to the rule contended for by plaintiffs, we have, as representing the value of the lands in that neighborhood, an average of $11.83, or somewhat less than the amount requisite for setting aside the sale. Apart from this, the evidence is overwhelming that owing to the presence of cane grass on this Guillory land it is worth less than the average land of the neighborhood.

74 Moreover, a number of acts of sale offered by defendants show that lands in the neighborhood have been sold for less than $12.47 per acre.

It is therefore ordered, adjudged and decreed that the judgment appealed from in so far as it dismisses the plaintiff's suit against Francois E. Savoie, be annulled and set aside and that the plaintiff now have judgment against the said Francois E. Savoie setting aside as simulated the sale made to him by Olivrel Guillory on the 8th day of December, 1904, of the following described property, to-wit:

"Three qyarters of lot 1 and the whole of lot 2 in Block 12, in Eunice, La., together with all the buildings and improvements thereon; also lots 7 and 8, Block 5, in Eunice, La., together with all the buildings and improvements thereon.

"¾ of lot 1, block 12 acquired by vendor from Gus Fuselier, and lot 2 block 2 acquired by exchange with O. Guillory, Jr., and lots 7 and 8 block 5 acquired by vendor from J. J. Lewis," and for the costs of this suit in so far as occasioned by that part of the suit relating to the said Savoie and that in all other respects the said judgment be affirmed.

75 Supreme Court of Louisiana.

Filed Apr. 7, 1906, T. McC. Hyman, Clerk.

Petition for Rehearing.

Supreme Court of Louisiana.

No. 15831.

NEW ORLEANS ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET ALS.

Plaintiffs' Application and Brief for Rehearing as to the Case Against the Defendants Haas and Alexander Miller.

To the Honorable Chief Justice and the Associate Justices:

This Court has rendered judgment reversing the judgment of the District Court as to the defendant, Savoy, holding that the transaction between him and Guillory was a simulation, but affirming the judgment as to the other parties who bought of Guillory.

The plaintiffs respectfully pray for a rehearing of their cause as

to the following points *only*, (accepting the opinion of the Court that the transactions to Haas and Miller were real), viz:

1. That the Court erred, in passing upon the alternative charge against the Haas defendants, as to the value of the property transferred to them being less than one-fifth over the price paid, (due to a calculation based on the number of acres as 806 instead of 880); and further, in holding that it was necessary for plaintiffs to have proved that the purchasers were in bad faith in order that they may annul the sale on the ground that the value of the property transferred exceeds by one-fifth the price given for it. C. C. 1981.

2. That admitting the sale to Miller to have been real, we respectfully declare that the Court erred in holding it good under the alternative charge of fraud, for by the express provisions of C. C. 1983, if the creditor merely endeavor to obtain a preference over the other creditors "under circumstances in which by law the endeavor to obtain such preference is declared to be a constructive fraud, the party shall only lose the advantage endeavored to be secured by such contract." We earnestly contend that even if the Court believes the unsupported statement of Miller that he paid the entire $7500 cash to his father-in-law without deducting the amount due him on the $3000 note of the former since the January previous, the fact
76 testified to by Miller himself that Guillory returned this $3000 to him within five days thereafter, proves—this was a means of doing by indirection what the law forbids should be done directly, and brands the transaction as "a constructive fraud."

Begging the kind indulgence of the Court for bringing these questions before it for further consideration, we desire to submit a brief argument in support of this application for rehearing, and will first take up the question raised as to our right to take back the property acquired by Haas upon the payment to him of the amount actually paid for the property. Your Honors have fallen into error in your calculation as to whether the property exceeded in value the amount paid by one-fifth, by adopting 806 acres as to the amount of land sold to Haas, (See opinion pp. 1 and 2), whereas the sale shows that the actual amount of land transferred was 880 acres (T. 34)—deduction being made for the amount previously sold and the "arpents" mentioned in the three smaller tracts being reduced to acres. The assessment of Guillory showed that he owned 861 acres, made up of one item of 806 and another of 55 acres, (T. 170), but the sale itself is more likely to be correct.

Now, your Honors in passing on this question at p. 17 of the opinion fix the amount of the consideration, including the notes assumed, interest to date of the sale and the $2000 cash, at $8376, and adding one-fifth thereto, $1675.20, the actual value of the property, the opinion states, must be shown to be $10,051.20, or $12.47 per acre, "in order to set aside the sale on the ground of inadequacy of the price." This result is attained by multiplying 806 acres by $12.47. But the actual number of acres is shown by the sale to be 880 acres, and even the assessment shows 861 acres, so here is an error which changes the figures entirely, making the value $11.04 per acre instead of $12.47. Now if we adopt your Honors' conclusion that the testimony of Fon-

tenot should not be considered in making up the average estimate of the witnesses as to the value of the land, and fix the average as does the Court at $11.83 per acre, the result will show that the property transferred to Haas was of the value of $10,185.63, or $134.43 over one-fifth more than the price claimed to have been paid by Haas according to the above figures, assuming that there were *only* 861 acres.

77 If the actual number of acres (880) is used as the basis of calculation, the result would be $10,410.40, or *$359.20 over the one-fifth more than the price* paid by Haas.

We respectfully submit that these figures demonstrate that the price paid for this property is inadequate under C. C. 1981, as was held by this Court in the case of Bonnet *v.* Wise, 115 A., and entitles the Trustee to take back the property on paying the price actually paid by the Haas defendants.

As to the cane grass, mention of which is made in the opinion at p. 17, your Honors will find that the estimates of the witnesses as enumerated at p. 53 of our brief was based on the *value of the land as a whole*, and that none of them said that the best of the land *only* was included in fixing their estimates. As to the sales made to Haas showing that he had bought a number of tracts for less than "$12.47 per acre," we beg to direct your Honors' attention to the fact that there is no evidence going to show that these lands were cultivable even, and as stated in our brief (p. 54), "the evidentiary value of this proof depends very much upon the particular circumstances under which the vendors in these sales parted with their property," of which not a word of evidence was offered. And while the Haases did not take the stand to prove these or any other facts, it is shown conclusively that they hold their lands in the vicinity of the Guillory tract at from $15 to $17 per acre. (See Transcript pp. 53, 61, and 83.)

We beg the pardon of the Court for here alluding to a fact that does not appear in the record, but which we declare is nevertheless a fact which was ascertained and clearly proved in the Bankruptcy proceedings, that the cash consideration of the sale from O. Guillory to S. & J. A. Haas was *$1000 instead of $2000*. While this fact was known to counsel of plaintiffs at the time of the trial we had no means of affirmatively proving it except by resorting to the testimony of these defendants. Of course if we had offered these parties as our witnesses we would have been bound to accept their testimony on all points, and this would have placed us at a great disadvantage. Besides, we firmly believed that these parties would testify on the trial, and we depended upon developing proof of this fact on cross-

78 examination. We were taken by surprise at their failure to testify, and we seriously believe and now confirm as our conviction that neither of these parties were offered as witnesses because they were aware that we were cognizant of the real cash consideration of the sale as well as of other facts which they did not desire to disclose. This is the real reason why this fact that we now urge upon the consideration of the Court was not developed on the trial, and while the fact here suggested does not appear in the record, we affirm it to be the truth and respectfully submit that the case be

remanded for the proof of this fact, leaving to both sides the opportunity of proving the actual consideration or any other facts pertinent thereto. And while we have shown that the actual value of the property involved entitles us to take the same on reimbursing to these defendants the price paid according to the sale, that if the case is remanded plaintiffs will show that the stated consideration is $1000 more than the amount actually paid. This will not prejudice the rights of defendants as this is all C. C. 1981 entitles them to.

The Court in its syllabus seems to extend the general principle as to proof of want of good faith to a transaction where the inadequacy of the price paid is at issue. Art. C. C. 1981 provides:

"If the contract be onerous, but made in fraud on the part of the debtor, but in good faith on the part of the person with whom he *contracted*, if the value of the property transferred by such contract excee- by one-fifth the price or consideration given for it, the creditors may annul the contract, and take back the property on paying the price or the value of the consideration with interest, but in this case they shall not receive the fruits."

Under the law, therefore, even if the good faith of the purchaser be conceded by the plaintiffs, the sale should be annulled if the property transferred "exceed by one-fifth the price given for it."

Your Honors have held the transaction to Miller to be real and we will not press our contention against it now, further than to seek a reconsideration of the question as to whether the $3000 note formed a part of the consideration given for the gin-plant. This defendant asserts that he gave his father-in-law the full $7500 in cash on the day of the sale as the consideration of the transfer, and that while he held his vendor's note for $3000, past due for almost a year, and knew that he was in embarrassed circumstances, he allowed him to claim and receive the entire purchase price without deduction for the note, and even without being asked to further extend the
79 term of payment of the note. The Court states in its opinion at p. 12 that this would have been "highly suspicious if unexplained," but that Miller does explain that the reason why he did not collect his $3000 note at the time of the sale was because his father-in-law told him of the slump in cotton and needed the money in order to keep his cotton until there was an advance in the price.

Now, paraphrasing the Court's observation just quoted, this explanation would have been entitled to some consideration if Miller had in fact allowed his father-in-law to keep the $3000 until cotton should advance in price, but he did not do so. He collected the full amount of the note from his father-in-law within five days of the sale! Can any one believe that so short a time would afford any relief? Now he does not tell the Court that the reason why he collected the note so soon afterwards was that cotton *did advance* in price within those five days. As a matter of fact, it is well known that cotton declined after the Government report of December, 1904. His explanation therefore (with due apology to the Court) does not "explain" why he so generously (?) allowed his father-in-law to keep his $3000 five days longer! Some other explanation must be found. We believe that viewed in its entirety the conclusion is ir-

resistible that Miller did not allow his father-in-law to keep his $3000 any longer than the day of the sale, or, that he paid the full amount to his father-in-law on that day with the understanding that the $3000 was to be returned to him soon thereafter.

There is no question but that Miller collected this $3000 within a very few days after the sale, because he himself says so, and the note bears the endorsement that it was paid Dec. 12, the sale being dated Dec. 7. Now in the light of human experience, is it not more likely that the truth is that this conduct of these two men (father-in-law and son-in-law) was actuated by a preconceived purpose to avoid the effect of the law (C. C. 1983) upon the transaction by doing by indirection what the law expressly prohibits? If Miller had only paid $4500 cash and turned over the $3000 note as the balance of the purchase price of the gin-plant, would not he have received a "preference" under Art. 1983? And if he went through the form of paying the entire $7500 on the day of the sale with the intention of getting back $3000 of the money thus paid a little later, and *actually* presented his note and *got the money* for it within five days after the sale, is not this practically and constructively the same thing, and is not the law applicable to the one case as strongly as to the other?

And under the decisions of this Court, though Miller may have been in good faith and ignorant of the actual condition of his vendor at the time of the sale, it will be annulled as to the part of the consideration represented by the debt due to him. Taylor *vs.* Knox, 2 L., 16; 37 A., 594.

We therefore respectfully pray for a rehearing of this cause on the question of the inadequacy of the price paid by the Haas defendants to their vendor, O. Guillory, as also on the question as to whether the transaction between the defendant Miller and O. Guillory should be deemed a preference to the extent of the $3000 note; and we pray that the case be remanded in order to prove the actual consideration paid by the Haases for the Guillory plantation, and further that the decree be amended with reference to these defendants, and for general relief.

Respectfully submitted,

KENNETH BAILLIO,
WILLIAM J. SANDOZ,
T. M. & J. D. MILLER,
Of Counsel for Plaintiffs and Appellants.

(Endorsed:) No. 15,831. Supreme Court of Louisiana. New Orleans Acid & Fertilizer Co. *et als. vs.* O. Guillory & Co. *et al.* Petition for Rehearing. Filed April 7, 1906. (Signed) Paul E. Mortimer, Dep. Clerk.

81 *Rehearing Granted and Refused.*

(Extracts from Minutes.)

NEW ORLEANS, MONDAY, *May 21st*, 1906.

The Court was duly opened pursuant to adjournment.
Present: Their Honors Joseph A. Breaux, Chief Justice; Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices.
By the Court.

No. 15831.

NEW ORLEANS ACID AND FERTILIZER COMPANY ET ALS.
vs.
O. GUILLORY & CO. ET AL.

It is ordered that the Rehearing applied for in this case be Granted as to sales to Samuel and John A. Haas and Alexander Miller, and otherwise, Refused.

Continuance.

(Extracts from Minutes.)

NEW ORLEANS, MONDAY, *November 12th*, 1906.

The Court was duly opened pursuant to adjournment.
Present: Their Honors Joseph A. Breaux, Chief Justice; Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices.

No. 15831.

NEW ORLEANS ACID AND FERTILIZER COMPANY ET ALS.
vs.
O. GUILLORY & CO. ET AL.

(On Rehearing.)

This case was ordered by the Court to be continued until to-morrow, Tuesday, the 13th day of November instant.

Called, Argued, and Submitted.

(Extract from Minutes.)

NEW ORLEANS, TUESDAY, *November 13th*, 1906.

The Court was duly opened pursuant to adjournment.
82 Present: Their Honors Joseph A. Breaux, Chief Justice; Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Judtices.

No. 15831.

NEW ORLEANS ACID AND FERTILIZING COMPANY ET ALS.
vs.
O. GUILLORY & CO. ET AL.

(On Rehearing.)

This cause came on this day to be heard and was argued by counsel: Mr. William Joel Sandoz and Mr. Kenneth Baillio, for the plaintiffs and appellants; Mr. John Wilkinson Lewis, for Samuel Haas and John A. Haas, defendants and appellants; Mr. Edward Benjamin Du Buisson, on behalf of O. Guillory & Co., Alexander Miller and Francois E. Savoie, defendants and appellee. The Court then took the cause under advisement upon the briefs for the respective parties in interest and the papers now on file.

Judgment on Rehearing.

(Extracts from Minutes.)

NEW ORLEANS, MONDAY, *November 26th*, 1906.

The Court was duly opened pursuant to adjournment.

Present: Their Honors Joseph A. Breaux, Chief Justice; Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices.

His Honor Mr. Justice Land pronounced the opinion and judgment of the Court in the following case:

No. 15831.

NEW ORLEANS ACID AND FERTILIZER COMPANY ET ALS.
vs.
O. GUILLORY & CO. ET AL.

On Rehearing.

It is therefore ordered, adjudged and decreed that the judg-
83 ment appealed from in so far as it dismisses the trustee's suit against Alexander Miller, be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the trustee, William J. Sandoz, have judgment against the said Alexander Miller, revoking and setting aside to the extent of Three Thousand Dollars the sale made to him by Olivier Guillory, as per notarial act of date Dec. 7, 1904, duly recorded and as described in plaintiffs' original petition in this suit; and it is further ordered that the property so conveyed be subjected to the payment of the judgment rendered herein in favor of said trustee to the extent of Three Thousand Dollars, and that the costs of suit in the district court be paid by Francis E. Savoie and Alexander Miller except those incurred on the demand against the Haases, and that the costs of this appeal be paid by said trustee, the said Savoie and the said Miller, one third each;

and it is finally ordered that our former decree herein as thus amended be reinstated and stand as the judgment of this court.

Breaux, C. J., concurs in the decree.

Provosty, J., dissenting, handed down a separate opinion in this case.

Opinion.

84 Mr. Justice Land, Monday, November 26th, 1906.

No. 15831.

NEW ORLEANS ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & CO. ET AL.

Appeal from the 16th Judicial District Court, Parish of St. Landry, Lewis, J.

On Rehearing.

A rehearing was granted in this case as to Samuel Haas and John A. Haas and as to Alexander Miller.

Plaintiffs' contention is that in the sale to Samuel Haas and John A. Haas the price paid was less than the real value of the property by one fifth, and they claim the right under Art. 1981 of the Civil Code "to annul the contract and take back the property on paying the price or the value of the consideration with interest."

There is a dispute as to the total acreage of the plantation. Plaintiffs claim that as per deed the total area amounted to 880 acres and as per assessment to 861 acres. Counsel for defendant contend that the total area on the face of the deed amounts to 827.17 acres. The largest subdivision, consisting of a section, originally contained 650 acres, but 4 acres and a strip "350 feet wide running along the north line of said section" had been previously sold. The deed conveying this strip is not in the record. The second and third tracts are described in the deed as "containing one hundred arpents, more or less." It is evident that it would require a survey to determine with accuracy the total acreage of the whole plantation. The importance of certainty as to total area is shown by the consideration, that if we fix the average estimate of the witnesses as to value at $11.83 per acre, as was done in our former opinion, and assume the total area to be 861 acres, the total value would be $10,185.63, or only $134.43 over one fifth more than the price paid. This small excess would disappear entirely if the total area be reduced by 11½ acres.

85 As to the value per acre, we do not think that it can be satisfactorily ascertained by the purely mathematical process of dividing the total estimates of the witnesses by their number. Value is a matter of opinion, and the weight of opinion depends on knowledge of the property in question and of real estate values in the vicinity.

White, a witness for the plaintiffs, who had cultivated the Gui lory plantation for several years, described the low land, about or third of the whole tract, as "very poor land and poisoned with car grass and wild rice," and "sorrier" than other land about tha neighborhood. He described the balance of the place as good ric land if water for irrigation could be obtained, there being no wate supply on the premises.

Evariste Varine, another witness for the plaintiffs, described th low or marsh land as almost uncultivatable owing to cane grass, an as fit only for pasturage.

Augelien Freige and Edward Dardeau, witnesses for defendan corroborate the testimony of the foregoing witnesses as to the inferi quality of the marsh or rice land on the Guillory plantation. The estimate the area of such land at 200 acres and its value at $5.00 $6.00 per acre.

Several witnesses for plaintiff had never seen the Guillory planta tion. Other witnesses knew the place in a general way but do no seem to have known of the existence of this considerable area of in ferior marsh land. Their estimates are based on the assumptio that the Guillory place averaged in quality with other improve lands in that section of the parish. Witnesses, who knew the actua conditions, estimated the value of the tract as below the averag Thus Varine while estimating good rice land at from $12.00 to $15.0 per acre, valued the Guillory tract at from $8.00 to $12.00 per acr Dardeau estimated the value of the whole tract at $8.00 per acr Freige, a witness for both parties, estimated the high land at $10.0 per acre.

86 The price per deed of sale is a fraction under $10.00 pe acre. We agree with the district judge that the evidence fai to show that this price was less by one fifth than the real value the tract at the time.

The motion to remand to enable plaintiffs to adduce evidence t show that the cash portion of the price was $1000.00 and not $2000.0 as stated in the deed is disposed of by the statement that plaintiff knew of the existence of such alleged evidence before the trial in th district court but were afraid to put the witness on the stand. W see no good reason to change our opinion as to the Haas transac tion.

The trustee in bankruptcy, was, on his own petition, made a part plaintiff and was authorized by order of court to prosecute the sui to final judgment for the benefit of the bankrupt estate. Neithe the capacity of the trustee nor his right to stand in judgment hav been questioned. It is argued, however, by counsel for Miller tha the partnership alone was adjudged a bankrupt and not the mem bers as individuals, and that as Miller, under the Bankrupt Act o 1898, is entitled to be paid by preference over partnership creditor out of the net proceeds of the individual estate of O. Guillory, plain tiffs were not prejudiced by the payment of the note held by Mille out of the individual assets of the debtor. The answer to this con tention is that the petition of the bankrupt shows that O. Guillor filed schedules of his individual debts and of his individual prop

erty. "Where a firm goes into bankruptcy it is a proceeding against each and every member, and both the firm and individual assets must be administered in bankruptcy." Collier on Bankruptcy, p. 60. Hence all rights of preference must be determined by the court having jurisdiction of the insolvency.

We shall now consider the transaction on its merits. Miller is the son-in-law of O. Guillory. On December 7, 1904, Guillory and Miller proceeded by private conveyance from Eunice to Opelousas, a distance of 30 miles, and after their arrival Guillory on the
87 same day and before the same notary sold his plantation to the Haases and his gin plant to Miller. The latter admits that he did not pay the price of $7500 in cash as recited in the act of sale, but testifies that he returned to his home at Eunice and on the same day paid the price to Guillory. Miller testified that he had the sum of $7500.00 and more in cash in his house. At the time of the sale, Miller held the demand note of Guillory for $3000, dated January 18, 1904, bearing on its face no interest. This note was paid by Guillory on December 12, 1904, five days after the sale to Miller. On the next day, December 13, O. Guillory & Co. wrote a circular letter to their creditors, announcing that the firm was unable to meet its obligations. This letter opens as follows: "The recent slump in cotton caught us with a large lot of spots which we were compelled to close out at an enormous loss." On January 5th, 1905, the firm rendered a statement to their creditors, showing liabilities $18,609.00 and assets $6,645.00 and proposed a compromise settlement at 25 cents on the dollar. It is not shown that O. Guillory used one dollar of the money realized from the sale to Miller to protect the spot cotton of the firm held on December 7, 1904, and it appears that said cotton was sold and the firm advised of the sale on or before December 13, 1904.

Miller was the sole witness adduced to explain and sustain this singular transaction between him and his father-in-law. Miller's testimony was taken under commission, and is very brief. His story may be epitomized as follows: On December 7, 1904, he went with O. Guillory to Opelousas. Miller's sole object in making the journey was to pay his taxes, and he happened to be present when Guillory offered to sell his gin plant to Sam Haas. Miller at once proposed to Mr. Haas to buy the gin plant in partnership, but the latter declined on the ground that his money was tied up. Guillory then said to Miller, "you buy it, you have the money." Miller immediately accepted the proposition, but did not pay the cash then because his money was at home, but on the same day they returned,
88 and Miller paid Guillory $7500 in cash. Miller at the time held Guillory's note for $3000 for money loaned, but nevertheless paid him the price in full upon his statement that he needed all the money to keep his cotton until prices advanced. The note however was paid by Guillory within a few days without any demand on the part of Miller.

Considering the interest of Miller in the result of this litigation, his relationship to Guillory, the ordinary motives which actuate men under like circumstances, and the unexplained voluntary pay

ment of the note a few days after the sale and probably out of its proceeds, all tend to the conclusion that the transaction was an indirect preference of the son-in-law over other creditors by a disguised giving in payment. Miller, knew at least, that Guillory was selling out his individual property, and that Guillory & Co., were in danger of financial loss by the fall in the price of cotton. Under the circumstances, ordinary prudence dictated that Miller should take steps to collect or secure the note, and at the same time Guillory naturally desired to protect his son-in-law.

The sudden purchase of the gin plant by Miller and the payment of the note five days later were evidently parts of the same transaction, which cannot be rationally explained on any other hypothesis.

We therefore are of opinion that the transfer to Miller should be annulled to the extent of the amount of the note.

It is therefore ordered, adjudged and decreed that the judgment appealed from in so far as it dismisses the trustee's suit against Alexander Miller, be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that the trustee, William J. Sandoz have judgment against the said Alexander Miller, revoking and setting aside to the extent of Three Thousand Dollars the sale made to him by Olivier Guillory, as per notarial act of date Dec. 7, 1904 duly recorded and as described in plaintiffs' original petition in this suit; and it is further ordered that the property so conveyed
88½ be subjected to the payment of the judgment rendered herein in favor of said trustee to the extent of Three Thousand Dollars, and that the costs of suit in the district court be paid by Francis E. Savoie and Alexander Miller except those incurred on the demand against the Haases, and that the costs of this appeal be paid by said trustee, the said Savoie and the said Miller, one third each and it is finally ordered that our former decree herein as thus amended be reinstated and stand as the judgment of this court.

Breaux, C. J., concurs in the decree.

Provosty, J., dissenting, handed down a separate opinion in this case.

89 PROVOSTY, *J.*, dissenting:

The father-in-law of Miller, who was carrying a large lot of cotton on a falling market, and who stood in pressing need of money for holding the cotton, in the hope that the market might turn. The father-in-law was the principal partner in a going commercial business; he was also owner of the lot and building where the business of his firm was carried on, and was also the owner of other lots with buildings, which he rented out; besides this he owned a plantation and a steam cotton gin. He professed to be selling his plantation and cotton gin for the purpose of getting money with which to carry his cotton. Under these circumstances, the relationship of Miller when considered in the light of the subsequent conduct of the father-in-law in defrauding his creditors, may give rise to a suspicion that the sale of the cotton gin to Miller was for the purpose of giving him an unfair preference over the other creditors of the

father-in-law, but that suspicion is not, in my opinion, sufficient ground for overthrowing his apparently candid testimony and the judgment of the judge *a quo* who knew him, and what weight was to be attached to his testimony. I therefore respectfully dissent.

90 *Second Application for Rehearing.*

Supreme Court, State of Louisiana.

No. 15831.

NEW ORLEANS ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & COMPANY ET AL.

Now into Court comes Alexander Miller, defendant and appellee in the above numbered and entitled cause, through his undersigned counsel, and respectfully moves the Court for a re-hearing of said cause on the ground that the Court erred in holding that the payment made by O. Guillory to mover was a preference whether it be considered as having been made at the time of the sale by deducting the amount of the debt from the purchase price or subsequently in money.

Respectfully submitted,
(Signed) E. B. DUBUISSON,
Attorney for Mover.

Argument.

Miller's case appeared so clear to me that I fear that I slighted it, both on the original and second hearing, with disastrous consequences to my client. For this reason I ask the Court with all the earnestness of my being to take up this application for a rehearing and to carefully consider it. I believe this can be done under Rule IX Sec. 6 of the Rules of this Court.

Plaintiff's suit against Miller partook of a double character. It was first charged that the sale made by O. Guillory to him was a fraudulent simulation and, if not, then a fraudulent preference.

91 The suit was originally brought by three of the creditors of O. Guillory & Co., of which the said O. Guillory was the most responsible member. To this suit Miller filed a general denial. Before the trial of the suit O. Guillory & Co. went into voluntary bankruptcy. The trustee in bankruptcy then asked to be made a party to the suit and to be allowed to prosecute same to final judgment. His prayer was granted. There is no averment in the original petition, nor in the trustee's intervention, nor was there any evidence offered by the trustee on the trial going to show that O. Guillory owed a dollar either at the time the suit was filed or when his firm was adjudged a bankrupt. As a matter of fact, O. Guillory did not owe one cent individually at either time. The averment contained in the petition addressed by his firm to the bankruptcy court to the effect that he annexed a schedule showing his individual

debts and the names and places of residence of his creditors is easily explained. For the petition and schedules, regular printed forms were used, as a comparison of the petition in the record with official form No. 2 will show. The schedule of individual debts showed nothing but blanks. The schedule of liabilities offered in evidence by plaintiff trustee showed nothing but firm debts. The fact that the schedules of the individual liabilities of the partners showed nothing but blanks satisfactorily explains why the trustee did not encumber the record with them. Now under these facts, I claim, and I believe I can demonstrate with the precision of a mathematical demonstration, that when this court found that the sale in question was not a simulation and that finding was acquiesced in by the plaintiff trustee, then and at that instant he should have gone out of court on the other branch of the case because neither his petition nor his evidence disclosed a cause of action to set aside a preference. The point was put at issue by Miller's general denial. Durham *vs.* Williams, 32 A 966.

92 On page 3 of the opinion your Honors quote from Collier on Bankruptcy as follows: "When a firm goes into bankruptcy it is a proceeding against each and every member, and both the firm and individual assets must be administered in bankruptcy," and then continue: "Hence all rights of preference must be determined by the court having jurisdiction of the insolvency." Both of these statements are true and correct, but they have no application to the case at bar. They are true when a question of preference arises as to funds in *gremio legis* or in the hands of the trustee, but are not true when the question at issue is not a contest between creditors as to whether one or the other should be paid by preference out of funds in the hands of the court, but whether certain property or funds should be brought into the court of bankruptcy, through the trustee, by suit against the transferee on the ground that the transfer by which they were conveyed was a voidable preference. This is a very different question from the other.

In paragraph *a* of section 60 of the bankruptcy law, as amended in 1903, it is provided:

"A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Now paragraph *f* of section 5 places partnership creditors and individual creditors into two separate and distinct classes. Under it, partnership creditors must be paid by preference out of partnership assets, and individual creditors must be paid by preference out of individual assets. Therefore, under the above definition of a preference, a transfer made by a partner to his individual creditors cannot be a preference as to partnership creditors because they are not of the *same class.*

93 In Collier on Bankruptcy, 5th Ed. p. 456, under the rubric "Effect, a greater percentage," it is said:

"As already indicated, this is now the supreme test. * * *

The 'greater percentage' refers only to creditors of the same class. This is the reason why the payment of wages is not a preference. If the effect of the transfer is to enable the creditor to receive out of the debtor's estate a larger percentage of his claim than other creditors of the same class, it constitutes a preference."

Hence the transfer made by Guillory to Miller could not possibly have been a preference as to any one else than individual creditors of Guillory, that is, creditors who were of the same class as Miller.

By paragraph *b* of sec. 60 of the bankruptcy law, as it now stands, it is provided that:

"If a bankrupt shall have given a preference * * * it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

This means that a transfer which involves a preference is voidable not void; that it is voidable at the suit of the trustee who may bring such suit either in the court of bankruptcy or the proper State court; but when he does sue, whether in the one court or the other, would not the most elementary rules of pleading and practice require him, in order to recover, to allege and prove that there were other creditors of the *same class* as the transferee and that, as a result of the transfer, the transferee would receive a greater percentage of his debt than such other creditors of the same class? To ask the question is to answer it. It is as axiomatic as that a straight line is the shortest distance between two points in a plane. Now plaintiffs' petition will be searched in vain for such an averment and so will the record for evidence to that effect. The only reference in the record to individual debts is found in the firm's petition to the Court of bankruptcy to be adjudged a bankrupt, but it has already
94 been explained how that reference happened to be there. As to the schedules of debts referred to, the trustee is their legal custodian. He offered in evidence that of the firm which shows debts, but not that of O. Guillory. The presumption is, therefore, that there were no debts carried on the latter. In Nunez *vs.* Bayhi, 52 A. 1753, it is said that when persons "who know the truth * * * fail to furnish evidence clearly within their power all the presumptions of law are against them."

In Johnson *vs.* Levy, 109 La. 1043, it is said:

"When effective proofs are within the reach of a party and he fails to produce them, a presumption is raised that they would, if produced, make against him." Citing Best on Evidence and two decisions of this Court.

Still more apposite than the above decisions is the following, taken from 16 Cyc. 937:

"Where the party on whom rests the burden of evidence as to a particular fact has the essential documents or evidence within his control, a peculiar clearness of proof is demanded."

Now consider the weakness of plaintiffs' case! It was incumbent on him to aver that there were other creditors of Guillory of the

same class as Miller. He did not do so. In the absence of the averment he had the document by which he could have supplied the omission by proof if unobjected to, but does not offer it. What is the inference? No such creditors existed. I shall conclude this branch of the case with the following familiar quotations from Hennen, page 524:

"To recover, one must make his claim certain; to make it only probable is not enough."

"That which is not proved to exist, in contemplation of law has no existence."

Besides, counsel for the trustee do not pretend in their brief that O. Guillory had any individual creditors at the time of the adjudication in bankruptcy of his firm unless two of the original plaintiffs be considered as such. On pages 12 and 13 of their brief on re-
hearing, they say:

95 "But if the bankruptcy law of 1898 is the law governing this transaction, as counsel will probably insist, owing to the fact that O. Guillory & Co. have been adjudicated bankrupts, the plaintiffs (N. O. Acid & Fertilizer Co. and Canadian Mill & Elevator Co.) being creditors of O. Guillory individually, as well as creditors of his firm, have an unquestionable right to urge the annulment of this transaction on the ground that it is a preference over them."

They urge that said plaintiffs are the individual creditors of O. Guillory as well as creditors of his firm because the indebtedness of the firm to each of said plaintiffs was extended after maturity by the execution of the joint and several notes of the individual members of the firm. The signing of the two notes did not have the effect contended for. The opening averment of the petitioner is that plaintiffs "Are creditors of O. Guillory & Co. a commercial firm composed of Olivrel Guillory, Olivrel E. Guillory and Ambroise Lafleur, residents of the above parish and state, located and doing business at Eunice, in said parish, in the following amounts, and as follows, to-wit:" then the petition goes on to state how the several plaintiffs became creditors of said firm and how the joint and several notes of the individual members of the firm happened to be executed and received, but denies that the indebtedness of the firm was novated by the acceptance of said notes. The notes did not increase or change the liability of the members of the firm. As commercial partners they were individually liable *in solido* for their firm's debts but that did not change the character of the obligation as a firm or partnership debt. This precise question has been brought up for adjudication in one of the bankruptcy courts and decided adversely to the trustee's contention. In *In re* Mosier, 112 Fed. Rep. 138, it is said:

"Joint and several notes given by partners for partnership liabilities constitute debts of the partnership notwithstanding the individual liability of the partners thereon, and the holders of such notes are not entitled to share in the individual estate of a partner in bankruptcy."

This completely disposes of the only contention on the part

of the trustee's counsel upon which they seek to base a
96 cause of action against Miller, and disposes of it adversely to them.

I come now to the contention of the trustee's counsel which was adopted by your Honors and which was fundamentally wrong as I think I have already shown. It is as follows:

But even if it should be contended that plaintiffs, being creditors of the firm of O. Guillory & Co., can not assail this transaction, involving the individual assets of one of the members of that firm, because of the provisions of the bankruptcy law that individual creditors are entitled to be first paid out of the assets of the individual partner, we respectfully maintain that this is a matter which properly comes before the Bankrupt Court, and as this Court is not concerned with the distribution of the funds, but solely as to whether or not a preference was sought or obtained by Miller, it would be justified in annulling the transaction as a preference to the extent of the $3,000 note under the authorities already quoted. (C. C. 2823, 3185; 33 A. 1279.) "(Brief pp. 12 & 13.)

It is only necessary to repeat here that the error in the above contention lies in the fact that it is assumed that the issue is one of distribution of funds in hand, whereas, in truth and in fact, the issue is whether under the bankruptcy law the transfer to Miller was a voidable preference or not. I think I have already abundantly shown that under both the pleadings and the evidence it was not and I shall not repeat the argument here.

But it may be asked, If Miller is the only individual creditor of Guillory, what harm does the decree inflict upon him? Will he not get his money back from the trustee? Yes, he will get a part of it back, but in its passage from his pockets to the trustee and back again, how much of it will stick to the trustee's hands for himself, his attorneys and the referee in the way of commissions, fees and costs? Yes, how much? how much? Is it fair to make him
97 expose his $3,000 to the picking of the above named officers when nobody is to be benefited by the picking but themselves? Is it fair to make him pay one-third of the costs of this court and a portion of those of the lower court when he has been guilty of no wrong? Is it just to find him guilty of a constructive fraud when as a matter of fact he acted in the premises strictly within his legal rights?

In conclusion, I repeat, if your honors please, what I said at the outset, that this case appeared to me, who had given it careful thought and study, to be so clear as not to merit much argument. As to the point herein argued, in my original brief I merely said:

"Even if the payment of the note had been a part consideration of the sale, this would not have constituted a prohibited preference, for under paragraph *f*, Sec. 5, of the Bankruptcy Law, individual creditors are entitled to preference out of the proceeds of individual property over firm creditors, and *vice versa*." (See my original brief, p. 4, top of page.)

On the re-hearing my brief was a little fuller, (see brief on rehearing pp. 8 & 9) but it appears that it was not sufficiently so to

enable an over-worked court not accustomed to construe the law referred to to seize upon the turning point in the controversy. I take all the blame upon myself and feel that I have scarcely done my client justice. It is for this reason that I so earnestly plead for a reconsideration of the case.

Respectfully submitted,

(Signed) F. B. DUBUISSON,
Attorney for Alexander Miller.

(Endorsed:) 15,831. Supreme Court of Louisiana. Received December 3, 1906. (Signed) Paul E. Mortimer, Deputy Clerk.

98 NEW ORLEANS, MONDAY, *January* 7, 1907.

The Court was duly opened pursuant to adjournment.

Present their Honors: Joseph A. Breaux, Chief Justice, Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices.

Absent: Francis T. Nicholls, Associate Justice.

By the Court.

No. 15831.

NEW ORLEANS ACID & FERTILIZER CO. ET ALS.
vs.
O. GUILLORY & COMPANY ET ALS.

The Court declines to entertain a second application for rehearing in this case.

Petition for Writ of Error.

Supreme Court of Louisiana.

No. 15831.

NEW ORLEANS ACID AND FERTILIZER COMPANY ET AL.
vs.
O. GUILLORY & CO. ET AL.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

The petition of Alexander Miller, one of the defendants in the above numbered and entitled cause, with respect represents:

That on November 26th, 1906, this Honorable Court rendered a decree and entered a judgment in this cause in favor of William J. Sandoz, Trustee, party plaintiff, and against your petitioner, party defendant, which said decree became final on the same day

99 that it was rendered.

That in said judgment and decree, and in the proceedings prior thereto, certain manifest errors were committed to the prejudice of your petitioner, Alexander Miller, all of which will appear in detail from the assignment of errors, which is filed with this petition.

That in this cause petitioner claimed titles, rights, privileges and immunities under the Constitution and Statutes of the United States,

and that the decree and judgment aforesaid of this Honorable Court are adverse to the same.

That petitioner claimed in this suit that the question whether a transfer made to him by Olivrel Guillory, a member of the bankrupt partnership of O. Guillory & Co. and attacked by the Trustee of said bankrupt firm, was a preference or not should be governed by the United States bankruptcy law and not by the laws of this State on the subject of preference and that under said United States bankruptcy law, approved July 1st, 1898, Chapter 541, (30 Statutes at Large, 547), and the Statutes of the United States amendatory thereof, said transfer was not a preference because Olivrel Guillory, the transferrer, had no other individual creditors than petitioner and because individual creditors of each member of a bankrupt partnership, under paragraph *f.* of section 5 of said United States bankruptcy law, are entitled to be paid by preference over partnership creditors out of the net proceeds of the estate of such individual partner; that the judgment and decree of this Honorab-e Court was in favor of the contention of the plaintiff Trustee that the State laws governed and that said transfer was a voidable preference under those laws and against the title, right, privilege and immunity specially set up and claimed by petitioner, wherein a manifest error has been committed to the great damage and injury of petitioner, and that the said judg-
100 ment and decree were adverse to petitioner and were rendered by the highest Court of this State in which a decision in this suit could be had.

That petitioner desires a writ of error from said judgment and decree of this Honorable Court to the Honorable the Supreme Court of the United States.

Wherefore, Petitioner prays that a writ of error, to operate as a supersedeas, may issue in this behalf to the Honorable the Supreme Court of the United States, for the correction of the errors so contained; that a transcript of the record of the proceedings and papers in this case duly authenticated, may be sent to the Supreme Court of the United States, and petitioner prays for all other orders or decrees necessary or needful in the premises, and for general relief.

(Signed) E. B. DUBUISSON,
Attorney for Petitioner.

Order Allowing Writ of Error.

Order.

Let a writ of error to operate as a supersedeas, be granted unto Alexander Miller, the petitioner herein, to the Honorable the Supreme Court of the United States, upon his furnishing bond, with good and solvent security, and conditioned according to law, in the sum of six thousand dollars.

New Orleans, January 28, A. D. 1907.

(Signed) JOS. A. BREAUX,
Chief Justice of the Supreme Court of the State of Louisiana.

Assignment of Errors.

No. 15831.

NEW ORLEANS ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & COMPANY ET AL.

Alexander Miller, one of the defendants and appellee in the
101 above numbered and entitled cause, in connection with his petition for a writ of error, makes the following assignment of errors, which, he avers, are to be found in the opinion, judgment and decree of this Honorable Court in this suit:

1. That the Court erred in applying the provisions of the laws of this State instead of those of the United States Bankruptcy law in deciding whether the transfer made by Olivrel Guillory, one of the members of the bankrupt partnership of O. Guillory & Co., to plaintiff in error at the suit of the Trustee in bankruptcy of said firm, was a voidable preference or not.

2. That the Court erred in holding that the transfer made by Olivrel Guillory, one of the members of the bankrupt partnership of O. Guillory & Co., to plaintiff in error before the adjudication in bankruptcy of said Guillory's firm to pay and satisfy a debt due by him individually to plaintiff in error was a voidable preference notwithstanding the fact that said Guillory did not own one dollar individually at the date when his firm was adjudicated a bankrupt.

3. That the Court erred in relegating to the United States bankruptcy court for decision the question of whether or not an individual creditor of a member of a bankrupt partnership was entitled to be paid by preference to firm creditors out of the proceeds of the individual assets of such member as the decision of that question was necessary, and a condition precedent, to the proper determination of the main issue which was whether the transfer assailed by the Trustee of said bankrupt firm was a voidable pref-rence or not.

4. That the Court erred in rendering a decree and in entering a judgment herein in favor of the plaintiff William J. Sandoz, Trustee of the bankrupt partnership of O. Guillory & Co. and against him, the said Alexander Miller, defendant.

(Signed) E. B. DUBUISSON,
Attorney for Alexander Miller.

102 (Endorsed:) No. 15831. Supreme Court of Louisiana. N. O. Acid & Fertilizer Co. Ltd. *et al. vs.* O. Guillory & Co. Ltd. *et al.* Petition and assignment of errors for writ of error to the Supreme Court of the United States. Filed January 28, 1907. (Signed) T. McC. Hyman, Clerk.

Copy of Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between New Orleans Acid and Fertilizer Company and others and O. Guillory & Co. and others No. 15831 of the Docket of said Supreme Court wherein was drawn in question the validity of a treaty or statute, of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or
103 commission; a manifest error hath happened to the great damage of the said Alexander Miller one of the defendants in the aboved numbered and entitled cause, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be — and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of January, in the year of our Lord one thousand nine hundred and seven.

(Signed) H. J. CARTER,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by
(Signed) JOS. A. BREAUX,
Chief Justice Supreme Court of Louisiana.

(Endorsed:) No. 15,831. Supreme Court of Louisiana. (Writ of Error) New Orleans Acid and Fertilizer Company *versus* O. Guillory & Co. *et al.* Copy of a Writ of Error lodged in the Clerk's Office of the Supreme Court of the State of Louisiana, in pursuance of the

statute in such cases made and provided, the 28 day of January one thousand nine hundred and seven. E. B. Du Buisson Attorney for Plaintiff in Error. Filed Jan'y 28, 1907. (Signed) T. McC. Hyman Clerk.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Louisiana, Greeting

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between New Orleans Acid and Fertilizer Company and others and O. Guillory & Co and others No. 15831 of the Docket of said Supreme Court wherein was drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
105 of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Alexander Miller one of the defendants in the above numbered and entitled cause as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of January, in the year of our Lord one thousand nine hundred and seven.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

H. J. CARTER,
Clerk of the Circuit Court of the United States for the Eastern District of Louisiana.

Allowed by
JOS. A. BREAUX,
Chief Justice Supreme Court, State of Louisiana.

[Endorsed:] No. 15831. Supreme Court of La. New Orleans Acid and Fertilizer Company *et als. versus* O. Guillory & Co. *et al.* Writ of Error. Filed January 28, 1907. T. McC. Hyman, Clerk.

106 *Bond for Writ of Error.*

Know all men by these presents, That we, Alexander Miller as principal, and John A. Haas and Edward B. Dubuisson, as sureties, are held and firmly bound unto the New Orleans Acid and Fertilizer Co., The Canadian County Mill and Elevator Company, The Morris McGraw Wooden Ware Company, and Wm. J. Sandoz Trustee in bankruptcy of O. Guillory & Co., Bankrupts in the full and just sum of six thousand dollars, to be paid to the said New Orleans Acid and Fertilizer Co., Canadian County Mill and Elevator Co., Morris McGraw Wooden Ware Co., and Wm. J. Sandoz, Trustees &c., or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 25 day of January, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a term of the Supreme Court of the State of Louisiana, holding session in and for the State of Louisiana, in a suit depending in said Court, between said New Orleans Acid and Fertilizer Co., Canadian County Mill and Elevator Co., Morris McGraw Wooden Ware Co., and Wm. J. Sandoz, Trustee &c., parties plaintiff and John A. Haas, Samuel Haas, Francois E. Savoie and Alexander Miller parties defendant a final judgment was rendered against the said Alexander Miller, defendant and in favor of said Wm. J. Sandoz, Trustee &c., and the said Alexander Miller having obtained a writ of error and filed a copy thereof in the Clerk'- Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said New Orleans Acid and Fertilizer Co., Canadian County Mill and Elevator Co., Morris McGraw Wooden Ware Co. and Wm. J. Sandoz, Trustee &c. citing and admon-
107 ishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Alexander Miller, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) ALEXANDER MILLER. [SEAL.]
(Signed) J. A. HAAS. [SEAL.]
(Signed) E. B. DUBUISSON. [SEAL.]

Sealed and delivered in presence of
(Signed) GEO. T. EDWARDS.
(Signed) F. G. CHACHERE.

Approved by
(Signed) JOS. A. BREAUX,
Chief Justice of the Supreme Court of the State of Louisiana.

STATE OF LOUISIANA, *Parish of St. Landry:*

Before me, the undersigned authority, personally came and appeared Dr. John A. Haas and Edward B. Dubuisson, residents of said Parish and State, to me well known, who being first duly sworn, did severally depose and say: That they signed the bond of Alexander Miller as sureties for a writ of error to the Supreme Court of the United States in the matter of the New Orleans Acid & Fertilizer Company, Limited, *et al. vs.* O. Guillory & Company, Limited, *et al.*, being No. 15831 of the docket of the Supreme Court of this State, and that they each own property, subject to seizure in the State and Parish, amounting to not less than Ten Thousand Dollars ($10,000.00) over and above all liabilities.

108 (Signed) J. A. HAAS.
(Signed) E. B. DUBUISSON.

Sworn to and subscribed before me, this 25th day of January, A. D. 1907.

[SEAL.] (Signed) ALFRED PAVY,
Notary Public.

(Endorsed:) No. 15831. Supreme Court of Louisiana. New Orleans Acid and Fertilizer Company *et als. vs.* O. Guillory & Co. *et al.* Bond for writ of Error. Filed February 2, 1907. (Signed) T. McC. Hyman, Clerk.

Stipulation Between Counsel as to Transcript for Writ of Error.

Supreme Court, State of Louisiana.

No. 15831.

NEW ORLEANS ACID & FERTILIZER CO. ET AL.
vs.
O. GUILLORY & COMPANY ET AL.

To Honorable T. McC. Hyman, Clerk of the Supreme Court of Louisiana:

It is agreed between Kenneth Baillio and William J. Sandoz, Attorneys for Plaintiffs (defendant in error), and Edward B. Dubuisson, attorney for Alexander Miller, one of the defendants (plaintiff in error), in the above numbered and entitled cause, that in making up the record for the Supreme Court of the United States, in pursuance to the Writ of error obtained herein by said Alexander Miller, you will omit from said record the following portions of the transcript herein, to-wit:

1. All citations to defendants;
2. Exceptions of Sam and John A. Haas, filed Feb. 13, 1905;
3. Bond for jury costs filed March 3, 1905.

109 4. Interlocutory judgment on exceptions of Sam and John A. Haas, filed April 3rd, 1905;

5. Election of plaintiffs in pursuance to interlocutory judgment in favor of Sam and John A. Haas, filed April 3rd, 1905;

6. Objection of Sam and John A. Haas to plaintiffs' election, filed April 11th 1905;
7. Answer of Sam and John A. Haas, filed July 7th, 1905;
8. Extract Minutes of February 13th, 1905;
9. Extract Minutes of April 1st, 1905;
10. Extract Minutes of April 3rd, 1905;
11. Extract Minutes of April 11th, 1905;
12. Extract Minutes of April 12th, 1905;
13. Extract Minutes of April 14th, 1905;
14. Extract Minutes of April 15th, 1905;
15. Extract Minutes of July 7th, 1905;
16. Extract Minutes of July 8th, 1905;
17. Extract Minutes of July 17th, 1905;
18. Extract Minutes of July 25th, 1905;
19. Extract Minutes of July 26th, 1905;
20. Act of sale of O. Guillory to Francois Savie, being item No. 6 of plaintiffs' evidence and marked "F"
21. Act of sale of O. Guillory to Sam and John A. Haas being item No. 8 of plaintiffs' evidence, marked "H"
22. Depositions of Gus E. Fontenot, being item No. 9 of plaintiffs' evidence, marked "I," together with commission, interrogatories and cross-interrogatories to said Fontenot and C. C. Duson;
23. Certificate of mortgage showing mortgages recorded against F. E. Savoie, being item No. 15 of plaintiffs' evidence, marked "O"
24. Testimony of Charles F. Boagni, Ed. White, A. J. Harrell, Theogene Reed, Louis Meyer, Evariste Vidrine, and J. W. Mulligan, being items Nos. 16 to 22, both inclusive of plaintiffs' evidence and marked from "P" to "V," both inclusive;
25. Charter of Eunice Mercantile Company, being item No. 23 of plaintiffs' evidence, and plaintiffs' bill of exception of which said charter forms a part;
26. All evidence offered by defendants *except* item- Nos. 12, 13 and 14, marked respectively, "No. 12," "No. 13" and "No. 14."
27. All of plaintiffs' evidence in rebuttal *except* item No. 4, marked "AA."

In pursuance to the above agreement, you will please leave out of the record to be forwarded to the Supreme Court of the United States, under the writ of error herein sued out by said Alexander Miller to said Court, all of the above portions of the transcript herein which are regarded by us as irrelevant to the issues under said writ.

Very Respectfully,

(Signed) W. J. SANDOZ,
(Signed) KENNETH BAILLIO,
Of Counsel for New Orleans Acid & Fertilizer Co., Canadian County Mill & Elevator Co., Morris McGraw Woodenware Co., and William J. Sandoz, Trustee in Bankruptcy of O. Guillory & Company, Bankrupts.
(Signed) E. B. BUBUISSON,
Attorney for Alexander Miller.

(Endorsed:) No. 15,831. Supreme Court of Louisiana. New O leans Acid and Fertilizer Co. *et al. vs.* O. Guillory & Co. Ltd. Stipu lation between Counsel as to transcript for writ of Error. File February 15, 1907. (Signed) T. McC. Hyman, Clerk.

111 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I, Thomas McCabe Hyman, clerk of the Supreme Court of th State of Louisiana do hereby certify that the foregoing one hundre and ten pages contain a full, true and complete copy of the proceed ings had in the Sixteenth Judicial District Court for the parish St. Landry, other than those omitted by virtue of the stipulatio entered into by counsel for all parties in interest, in a certain su wherein the New Orleans Acid and Fertilizer Company and Othe were plaintiffs, and O. Guillory & Company and Others were d fendants, and also of all the proceedings had in this Supreme Cou on the appeal taken by said plaintiffs, which appeal is now on th files thereof, under No. 15831.

In testimony whereof I have hereunto set my hand, and affixe the seal of said court at the city of New Orleans, this Twenty-fir day of February *Anno Domini*, one thousand nine hundred an seven and in the one hundred and thirty-first year of the Indepen ence of the United States of America.

[Seal Supreme Court of the State of Louisiana.]

T. McC. HYMAN, *Clerk.*

112 *Certificate of the Chief Justice.*

I, Joseph A. Breaux, Chief Justice of the Supreme Court of th State of Louisiana, do hereby certify that Thomas McCabe Hyma is Clerk of the Supreme Court of the State of Louisiana; that th signature of Thomas McCabe Hyman to the foregoing certificate in the proper handwriting of him the said clerk; that said certi cate is in due form of law, and that full faith and credit are due t all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal the city of New Orleans, this the Twenty-first day of February, A. D one thousand nine hundred and seven.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice.

113 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to The New Orleans Acid and Fertilizer Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Louisiana at New Orleans, wherein Alexander Miller is plaintiff in error, and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of January in the year of our Lord one thousand nine hundred and seven.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice of the Supreme Court of the State of Louisiana.

[Endorsed:] Supreme Court of the State of Louisiana. No. 15,831. New Orleans Acid and Fertilizer Company *et als. vs.* O. Guillory & Co. *et al.* Citation. Sheriff's return. Service of the within citation accepted, this 16" Feb'y, 1907. N. O. Acid & Fer. Co., per W. J. Sandoz, att'y. Filed Febr'y 18, 1907. T. McC. Hyman, Clerk.

114 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to the Canadian County Mill and Elevator Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Louisiana at New Orleans, wherein Alexander Miller is plaintiff in error, and you are defendants in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of January in the year of our Lord one thousand nine hundred and seven.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice of the Supreme Court of the State of Louisiana.

[Endorsed:] Supreme Court of the State of Louisiana. No. 15,83
New Orleans Acid and Fertilizer Company *et als. vs.* O. Guillory
Co. *et al.* Citation. Sheriff's Return. Service of the within citatio
accepted, this 16th Feb'y, 1907. Canadian Co. Mill & Elevator Co
per W. J. Sandoz, Att'y. Filed Feb'y 18, 1907. T. McC. Hyma
Clerk.

115 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to The Morris McGraw Woode
Ware Company, Greeting:

You are hereby cited and admonished to be and appear at a Su
preme Court of the United States to be holden at the City of Wash
ington, within thirty days from the date hereof pursuant to a wri
of error filed in the Clerk's Office of the Supreme Court of the Stat
of Louisiana at New Orleans, wherein Alexander Miller is plaintif
in error, and you are defendants in error to show cause, if any ther
be, why the judgment rendered against the said plaintiff in error a
in said writ of error mentioned, should not be corrected, and wh
speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of th
Supreme Court of the United States, this 28th day of January in th
year of our Lord one thousand nine hundred and seven.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice of the Supreme Court of the State of Louisiana.

[Endorsed:] Supreme Court of the State of Louisiana. No. 15,831
New Orleans Acid and Fertilizer Company *et als. vs.* O. Guillory &
Co. *et al.* Citation. Sheriff's Return. Service of the within citatio
accepted, this 16" Feb'y, 1907. Morris McGraw Woodenware Co., pe
W. J. Sandoz, Att'y. Filed Feb'y 18, 1907. T. McC. Hyman, Clerk

116 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to William J. Sandoz, Trustee in
Bankruptcy of O. Guillory & Co., Greeting:

You are hereby cited and admonished to be and appear at a Su
preme Court of the United States to be holden at the City of Wash
ington, within thirty days from the date hereof pursuant to a writ
of error filed in the Clerk's Office of the Supreme Court of the State
of Louisiana at New Orleans, wherein Alexander Miller is plaintiff
in error, and you are defendant in error to show cause, if any there
be, why the judgment rendered against the said plaintiff in error as
in said writ of error mentioned, should not be corrected, and why
speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28th day of January in the year of our Lord one thousand nine hundred and seven.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice of the Supreme Court of the State of Louisiana.

[Endorsed:] Supreme Court of the State of Louisiana. No. 15,831. New Orleans Acid and Fertilizer Company *et als. vs.* O. Guillory & Co. *et al.* Citation. Sheriff's Return. Service of the within citation waived and accepted, reserving legal delays and rights. W. J. Sandoz, Trustee in Bankruptcy O. Guillory & Co., Feb'y 16/07. In *pro. per.* Filed Feb'y 18, 1907. T. McC. Hyman, Clerk.

Endorsed on cover: File No. 20,596. Louisiana supreme court. Term No. 631. Alexander Miller, plaintiff in error, *vs.* The New Orleans Acid and Fertilizer Company, The Canadian County Mill and Elevator Company, The Morris McGraw Wooden Ware Company, and William J. Sandoz, trustee in bankruptcy of O. Guillory & Co. Filed March 1st, 1907. File No. 20,596.

In the Supreme Court of the United States, October Term, 1907.

No. 246.

ALEXANDER MILLER, Plaintiff in Error,
vs.
NEW ORLEANS ACID & FERTILIZER CO. ET AL., Defendants in Error.

It is stipulated and agreed between E. B. Dubuisson, attorney for plaintiff in error, and Kenneth Baillio, of counsel for defendants in error, that the copies referred to in items No. 4 and 7 of plaintiff's evidence, found on pages 10 and 11 of the printed record herein certified to as correct by the Clerk of the Supreme Court of the State of Louisiana, hereto annexed, and inadvertently omitted from the record as sent up to this court by him, may be now received and filed as an addition to the record in this Court and be considered by this Court on the hearing hereof the same as if said certified copies had been certified up with the transcript of record.

Done and signed at Opelousas, Louisiana, this 2nd day of August A. D 1907.

E. B. DUBUISSON,
Attorney for Plaintiff in Error.
KENNETH BAILLIO,
Of Counsel for Defendants in Error.

Forms in bankruptcy as adopted and established by the U. S. Supreme Court.

SCHEDULE A (3).

Creditors Whose Claims are Unsecured.

(N. B.—When the name and residence (or either) of any drawer, maker, indorser or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off as stated in the schedule of property.)

Reference to ledger or voucher.	Names of creditors.	Residence. (If unknown, that fact must be stated.)	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount.
83	W. B. Thompson & Co.	New Orleans, La....	During the year 1904, at Eunice, La.	Money had and received on open account	10,168.37
13	Pollock & Bernheimer.	Mobile, Ala.....	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account total 3202.87 ; note 1714.99, open account 1486.88.	3,202.87
105	N. O. Acid & Fertilizer Co.	New Orleans, La....	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account which has been closed by note.	3,240.50
54	Seidel Furniture Mfg. Co.	New Orleans, La....	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account which has been closed by note.	638.45
29	Canadian County Mill and Elevator Co.	El Reno, Oklahoma.	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account, closed by note.	636.33
7	Morris McGraw Wood & Willow-ware Co.	New Orleans, La....	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account..	239.63
154	Ferdinand Gumble & Co.	New Orleans, La....	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account..	267.16
113	B. & H. Flaspollers' Sons.	New Orleans, La....	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account..	168.00
147	Nicholas Burke Co., Ltd.	New Orleans, La....	During the year 1904.	Goods and merchandies purchased on open account..	31.10
89	Seesel, Ashner & Sugarman.	New Orleans, La....	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account..	28.25
	Kohlmann Bros.....	New Orleans, La....	During the year 1904, at Eunice, La.	Goods and merchandies purchased on open account..	8.66
	Total.	.....	.....	.....	18,629.34

Filed July 26, 1905.
PAUL W. LAFLEUR, *D'y Cl'k.*

Witness:
(S'g'd) E. B. DUBUISSON.

(Signed) his OLIVEL x GUILLORY, *Petitioner.* mark

(Signed) OLIVEL E. GUILLORY.
" AMBOISE LAFLEUR.

[Endorsed:] No. —. United States District Court, District of —. In Bankruptcy. In the matter of —— ——, bankrupt. Schedule A 3. Filed at — o'clock — M., this — day of ——, 190–. —— ——, Clerk. —— ——, Attorney.

Act of Sale, Olivrel Guillory to Alexandre Miller, Marked "G."

STATE OF LOUISIANA, *Parish of St. Landry:*

Be it known, that on this seventh day of the month of December, in the year of our Lord, 1904, before me, James Raoul Pavy, a Notary Public, duly commissioned, qualified and sworn, in and for the parish and State above written and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared Olivrel Guillory, a resident of above parish and State, who declared that for, and in consideration of, the sum and price hereinafter set forth he does by these presents, grant, bargain, sell, convey, transfer, assign, and set over with full guarantee against all troubles, debts, mortgages, claims, evictions, alienations or other incumbrances whatsoever, and with subrogation to all his rights and actions of warranty against all previous owners, and with full guarantee of title unto Alexandre Miller, of same residence, here present, purchasing and accepting for himself, his heirs and assigns, and acknowledging delivery and possession thereof, the following described property, to-wit:

The following lots of ground situated in the town of Eunice, La., with all the buildings and improvements thereon, including the gin and ginhouse situated on the same, and being lots one, two, three, four, five and six of block No. 14, as per plat of said town, on file in the Record-'s office of the parish of St. Landry, and being the same lots acquired by vendor from Rev. Alfred Bacciochi. From the above is reserved a small dwelling erected on lot No. 6 of above block, erected by Robert Tate.

This sale is made and accepted for and in consideration of the price and sum of Seven Thousand Five Hundred Dollars, cash in hand paid, the receipt whereof is hereby acknowledged, and full acquittance and discharge granted therefor. Contracting parties dispense me, Notary, from the production of the Certificate of Mortgage required by law, and tax collector's receipts.

Done and passed at Opelousas, La., on the day, month and year aforesaid, in the presence of Leon Landau and Leopold Goudchaux, competent witnesses, who have signed with the appearers and me, Notary, after reading the whole.

(S'g'd)
(")

O. GUILLORY.
ALEXANDRE MILLER.
J. R. PAVY,
Notary Public.

Witnesses:
LEON LANDAU.
L. GOUDCHAUX.

STATE OF LOUISIANA, *Parish of St. Landry:*

I hereby certify that the within and foregoing is a true and correct copy of original act #54097, on file and of record in my office, in Conveyance Book Y No. 3¼, p. 269, of date Dec. 7, '04.

Witness my hand and the seal of my office, at Opelousas, La., this 28th day of July, 1905.

[SEAL.] (Signed) L. A. SANDOZ,
D'y Clk 16th Jud. Dist. of La.

Filed July 25, 1905.

PAUL W. LAFLEUR, *D'y Clk.*

UNITED STATES OF AMERICA, *State of Louisiana:*

Supreme Court of the State of Louisiana.

I hereby certify the foregoing to contain true extracts from the Record of the proceedings had in the 16th Judicial District Court, for the parish of St. Landry, in a certain suit wherein New Orleans Acid & Fertilizer Co. *et als.* were plaintiffs and O. Guillory & Co. *et al.* were defendants, which record is on the files of this Court under No. 15,831, inadvertently omitted from the copy of the transcript in this case furnished for the writ of error from the Supreme Court of the United States of America to this Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at the City of New Orleans, this the thirtieth day of July *Anno Domini* 1907, and in the one hundred and thirty-second year of the Independence of the United States of America.

[Seal Supreme Court of the State of Louisiana.]

T. McC. HYMAN, *Clerk.*

[Endorsed:] File No. 20,596. Supreme Court U. S., October term, 1907. Term No. 246. Alexander Miller, pl'ff in error, *vs.* The New Orleans Acid & Fertilizer Company *et al.* Stipulation and addition to record. Filed Aug. 7, 1907.

Office Supreme Court, U. S.
FILED
APR 25 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 32.

ALEXANDER MILLER,

PLAINTIFF IN ERROR,

VERSUS

NEW ORLEANS ACID AND FERTILIZER COMPANY *ET AL.*,

DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

E. B. DUBUISSON,
Attorney for Plaintiff in Error.

J. G. HAUSER, "The Legal Printer," 620-22 Poydras Street, N. O.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 246.

ALEXANDER MILLER,

PLAINTIFF IN ERROR,

VERSUS

NEW ORLEANS ACID AND FERTILIZER COMPANY *ET AL.*,

DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

During the fall of the year 1904 the commercial copartnership composed of Olivrel Guillory, Olivrel E. Guillory and Ambroise Lafleur, trading under the firm name

of O. Guillory & Company, at the Town of Eunice, in St. Landry Parish, State of Louisiana, became embarrassed in its affairs through losses sustained through speculation in spot cotton.

Olivrel Guillory's individual assets were large in comparison to those of the firm. Among his assets he had urban and predial real estate. The firm was holding a lot of spot cotton on a declining market, and matters were reaching a crisis, when Guillory, in order to protect his firm's cotton, began selling his real estate. On December 7, 1904, he sold a lot of rural property to Samuel and John A. Haas for $2,000 in cash and the assumption of a mortgage of $6,000 which bore upon the property. On the same day he sold to the plaintiff in error, his son-in-law, a ginning plant and the lots of ground on which it was situated, in the Town of Eunice, for $7,500 cash. On the next day he sold to F. E. Savoy certain improved lots situated in the same town for an alleged cash consideration of $3,500.

On February 2, 1905, the New Orleans Acid and Fertilizer Company, the Canadian County Mill and Elevator Company, and the Morris McGraw Woodenware Company, alleging that they were "creditors of O. Guillory & Company, a commercial firm composed of Olivrel Guillory, Olivrel E. Guillory and Ambroise Lafleur" (Rec., pp. 1 and 2), joined in an action against the several vendees of Olivrel Guillory to set aside the sales made by him as aforesaid, on the ground that they were simulated,

but, if not simulated, then fraudulent. This suit was brought in the proper State court. Plaintiff in error answered by pleading the general issue.

Pending the trial of the issues thus raised, the firm of O. Guillory & Company went into voluntary bankruptcy.

Thereupon, W. J. Sandoz, trustee, defendant in error, was made a party to the suit by the following petition and order of Court:

> "Now, into this Honorable Court, through his undersigned counsel, comes William J. Sandoz, the duly appointed and qualified trustee of the bankrupt estate of the said O. Guillory & Company, and respectfully shows:
>
> "That since the institution of this suit the said O. Guillory & Company have made application for, and been adjudged, bankrupts in the District Court of the United States for the Western District of Louisiana.
>
> "That, under the Bankrupt Law of the United States (Act of 1898), the trustee of a bankrupt estate succeeds to the rights of the creditors who may have brought actions to annul any transactions affecting the property of the bankrupts, and the law makes it his duty to prosecute the same for the benefit of the said bankrupt estate in his capacity as trustee.
>
> "Wherefore, the premises considered, the said William J. Sandoz, trustee, prays to be made a party plaintiff in this suit and duly authorized to prosecute same to final judgment for the benefit of the said bankrupt estate of O. Guillory & Co., and he prays for service of this petition, and of order herein on defendants, for costs and for general relief.
>
> (Signed) "By his Attorney,
>
> "KENNETH BAILLIO."

ORDER.

"The foregoing petition and prayer considered, it is ordered that William J. Sandoz, trustee of the estate of O. Guillory & Company, be, and he is hereby, made a party plaintiff in the above entitled and numbered cause, with authority to prosecute the same to final judgment for the benefit of said bankrupt estate.

"Done, ordered and signed, in open court, at Opelousas, La., on this, the 26th day of June, A. D. 1905.

(Signed) "E. T. LEWIS,
"*Judge 16th Jud. Dis. Court of La.*"

(Rec., pp. 9 and 10.)

On the trial it was shown that, at the time the gin plant was sold by Olivrel Guillory to plaintiff in error, the former was indebted to the latter in the sum of $3,000, represented by a promissory note, dated January 18, 1904, and payable on demand without interest. (Rec., p. 28.) This indebtedness was not deducted from the purchase price of the property, but was paid five days after the sale—to wit, on December 12, 1904.

The case was submitted in the trial Court without argument. (Rec., p. 29.) That Court in rendering its judgment, after stating the substance of the original plaintiffs' demands, continued as follows:

"Subsequently, all parties defendant, including said transferees, pleaded the general issue. Some time thereafter William J. Sandoz, alleging that the said O. Guillory & Company had been adjudged bankrupts in the District Court of the United States for the Western District of Louisiana, and that he had been appointed trustee of the bankrupt estate, prayed

to be made a party to the suit and to prosecute the same for the benefit of the bankrupt estate in his capacity as trustee.

"The case was regularly fixed and proceeded to trial. The proof showed to the satisfaction of the Court that O. Guillory & Company was indebted to the original plaintiffs in the respective sums claimed by them. The Court, however, is of the opinion that the evidence fails to show that the sale or transfers attacked were either simulated or fraudulent; that it fails to show that the said O. Guillory & Company was insolvent at the time of said transfers, and that the transferees knew of the insolvency. The Court is of the opinion, on the other hand, that the evidence affirmatively shows that the transfers were not simulated; that the sums respectively mentioned as the considerations therefor were actually paid and that said considerations were fair and adequate prices for the properties transferred, and that, therefore, plaintiffs have utterly failed to sustain the attack leveled against said transfers.

"Since the claims of the plaintiffs are such as would be released by a discharge of the bankrupts, the Court cannot grant absolute judgment in their favor until the Court of Bankruptcy shall have passed upon the application for a discharge, if any such has been filed, or until the expiration of the time within which the same may be filed. For these reasons, and because the law and the evidence are in favor thereof, it is

"Ordered, adjudged and decreed, that plaintiffs' demand to have the transfers above mentioned set aside, either as simulated or fraudulent, be rejected at their costs, and their right to a money judgment against O. Guillory & Company and the individual members of said firm be stayed in accordance with the provisions of Section 11 of the Bankruptcy Act of 1898, of the United States." (Rec., p. 34.)

From this judgment the trustee appealed to the Supreme Court of Louisiana.

That Court on the original hearing affirmed the judgment of the lower Court as to plaintiff in error. In the course of its opinion the following statement of fact was made, viz.:

> "Guillory individually is not shown to have owed a dollar apart from the $3,000 note to his son-in-law Miller, and the $6,000 mortgage assumed by the Haases." (Rec., p. 47.)

This finding of fact was not disturbed on rehearing.

In the application for a rehearing the appellant acquiesced in the opinion of the Court to the effect that the sale in question was real and not simulated. He contended, however, as follows:

> "2. That, admitting the sale to Miller to have been real, we respectfully declare that the Court erred in holding it good under the alternative charge of fraud, for by the express provisions of C. C. 1983, if the creditor merely endeavor to obtain a preference over the other creditors 'under circumstances in which by law the endeavor to obtain such preference is declared to be a constructive fraud, the party shall only lose the advantage endeavored to be secured by such contract.' We earnestly contend that, even if the Court believes the unsupported statement of Miller that he paid the entire $7,500 cash to his father-in-law, without deducting the amount due him on the $3,000 note of the former since the January previous, the fact testified to by Miller himself, that Guillory returned this $3,000 to

him within five days thereafter, proves this was a means of doing by indirection what the law forbids should be done directly, and brands the transaction as a 'constructive fraud.'" (Rec., p. 53.)

* * * * * * *

"There is no question but that Miller collected this $3,000 within a very few days after the sale, because he himself says so, and the note bears the indorsement that it was paid December 12th, the sale being dated December 7th. Now, in the light of human experience, is it not more likely that the truth is that this conduct of these two men (father-in-law and son-in-law) was actuated by a preconceived purpose to avoid the effect of the law (C. C. 1983) upon the transaction by doing by indirection what the law expressly prohibits? If Miller had only paid $4,500 cash and turned over the $3,000 note as the balance of the purchase price of the gin plant, would not he have received a 'preference' under Article 1983? And if he went through the form of paying the entire $7,500 on the day of the sale, with the intention of getting back $3,000 of the money thus paid a little later, and *actually* presented his note and *got the money* for it within five days after the sale, is not this practically and constructively the same thing, and is not the law applicable to the one case as strongly as to the other?" (Rec., p. 56.)

That portion of the prayer of said application which applies to Miller was as follows:

"We, therefore, respectfully pray for a rehearing of this cause * * * on the question as to whether the transaction between the defendant Miller and O. Guillory should be deemed a preference to the extent of the $3,000 note." (Rec., p. 56.)

Article 1983 of the Revised Civil Code of Louisiana, referred to by the trustee (defendant in error) in his application to the Supreme Court of Louisiana for a rehearing (Rec., p. 53), reads as follows:

> "But, if such fraud consisted merely in the endeavor to obtain a preference over other creditors, for the securing of payment of a just debt, under circumstances in which by law the endeavor to obtain such preference is declared to be a constructive fraud, in such case the party shall lose only the advantage endeavored to be secured by such contract, and shall be reimbursed what he may have given or paid, but without interest; and he shall restore all advantages he has received from the transaction."

Article 1986 of the same Code provides as follows:

> "No sale of property, or other contract, made in the usual course of the party's business, nor any payment of a just debt in money, shall be affected by virtue of any provision in this section, although the party was in insolvent circumstances, and the person with whom he contracted, or to whom he made the payment, knew of such insolvency."

Article 2658 of said Code is complementary to Article 1986. It provides as follows:

> "This difference gives rise to another in the effect of these contracts in cases of the insolvency of the debtor. He may, although insolvent, lawfully sell for the price which is paid to him, but the law forbids to give in payment to one creditor, to the prejudice of the others, any other thing than the sum of money due."

The contention of the plaintiff in error in the Supreme Court of Louisiana, both on the original hearing and on the rehearing, in so far as the charge that the sale made to him by his father-in-law was a voidable preference to the extent of $3,000, the amount of the demand note above mentioned, was concerned, was two-fold: He contended, first, that the evidence showed that the consideration of the transfer was a payment in money, and that, therefore, under Articles 1986 and 2658 of the Civil Code of Louisiana, Article 1983 of said Code relied upon by the trustee did not apply; and, secondly, that, even if the payment of the note a few days after the sale of the gin property might be construed as a part of the same transaction, still no preference was created thereby, because the firm of O. Guillory & Company had been adjudicated a voluntary bankrupt while the individual members of the firm had not; because the original plaintiffs were firm creditors, and the substituted plaintiff was the trustee of the bankrupt firm and not of the individual members; because he (plaintiff in error) was the individual creditor of O. Guillory, and was not a creditor of the firm, and, because, under paragraph *f* of Section 5 of the United States Bankruptcy Law (30 U. S. Statutes at Large, 547), individual creditors of the members of a partnership are entitled to be paid by preference out of the net proceeds of their debtors' individual estates over the partnership creditors.

On the original hearing in said Supreme Court, the first of said contentions of plaintiff in error was maintained and no reference whatever was made to the second. On the second hearing both of his points were overruled. The Court denied the second of his contentions—the only one with which we are presently concerned—in these words:

> "The trustee in bankruptcy was, on his own petition, made a party plaintiff, and was authorized by order of court to prosecute the suit to final judgment for the benefit of the bankrupt estate. Neither the capacity of the trustee nor his right to stand in judgment has been questioned. It is argued, however, by counsel for Miller, that the partnership alone was adjudged a bankrupt, and not the members as individuals, and that as Miller, under the Bankruptcy Act of 1898, is entitled to be paid by preference over partnership creditors out of the net proceeds of the individual estate of O. Guillory, plaintiffs were not prejudiced by the payment of the note held by Miller out of the individual assets of the debtor. The answer to this contention is that the petition of the bankrupt shows that O. Guillory filed schedules of his individual debts and of his individual property. 'Where a firm goes into bankruptcy it is a proceeding against each and every member, and both the firm and individual assets must be administered in bankruptcy.' (Collier on Bankruptcy, p. 60.) Hence, all rights of preference must be determined by the Court having jurisdiction of the insolvency." (Rec., pp. 60 and 61.)

The decree was in part as follows:

> "It is, therefore, ordered adjudged and decreed, that the judgment appealed from, in so far as it dis-

misses the trustee's suit against Alexander Miller, be annulled, avoided and reversed, and it is now ordered, adjudged and decreed, that the trustee, William J. Sandoz, have judgment against the said Alexander Miller, revoking and setting aside to the extent of three thousand dollars the sale made to him by Olivier Guillory, as per notarial act, of date December 7, 1904, duly recorded and as described in plaintiffs' original petition in this suit; and it is further ordered that the property so conveyed be subjected to the payment of the judgment rendered herein in favor of said trustee to the extent of three thousand dollars." (Rec., p. 62.)

This judgment having become final, a writ of error to this Court was applied for and granted by the Chief Justice of the Supreme Court of Louisiana. (Rec., p. 69.)

The principal and substantial parts of the petition for said writ are as follows:

"That, in said judgment and decree, and in the proceedings prior thereto, certain manifest errors were committed to the prejudice of your petitioner, Alexander Miller, all of which will appear in detail from the assignment of errors, which is filed with this petition.

"That, in this cause, petitioner claimed titles, rights, privileges and immunities under the Constitution and statutes of the United States, and that the decree and judgment aforesaid of this Honorable Court are adverse to the same.

"That petitioner claimed in this suit that the question whether a transfer made to him by Olivrel Guillory, a member of the bankrupt partnership of O. Guillory & Company, and attacked by the trustee of said bankrupt firm, was a preference or not, should

be governed by the United States Bankruptcy Law, and not by the laws of this State on the subject of preference, and that under said United States Bankruptcy Law, approved July 1, 1898, Chapter 541 (30 Statutes at Large, 547), and the statutes of the United States amendatory thereof, said transfer was not a preference, because Olivrel Guillory, the transferrer, had no other individual creditors than petitioner, and because individual creditors of each member of a bankrupt partnership, under paragraph *f* of Section 5 of said United States Bankruptcy Law, are entitled to be paid by preference over partnership creditors out of the net proceeds of the estate of such individual partner; that the judgment and decree of this Honorable Court was in favor of the contention of the plaintiff trustee that the State laws governed, and that said transfer was a voidable preference under those laws and against the title, right, privilege and immunity specially set up and claimed by petitioner, wherein a manifest error has been committed to the great damage and injury of petitioner, and that the said judgment and decree were adverse to petitioner and were rendered by the highest Court of this State in which a decision in this suit could be had." (Rec., pp. 68 and 69.)

The errors assigned were as follows:

"1. That the Court erred in applying the provisions of the laws of this State instead of those of the United States Bankruptcy Law in deciding whether the transfer made by Olivrel Guillory, one of the members of the bankrupt partnership of O. Guillory & Company, to plaintiff in error, at the suit of the trustee in bankruptcy of said firm, was a voidable preference or not.

"2. That the Court erred in holding that the transfer made by Olivrel Guillory, one of the mem-

bers of the bankrupt partnership of O. Guillory & Company, to plaintiff in error, before the adjudication in bankruptcy of said Guillory's firm, to pay and satisfy a debt due by him individually to plaintiff in error, was a voidable preference, notwithstanding the fact that said Guillory did not owe one dollar individually at the date when his firm was adjudicated a bankrupt.

"3. That the Court erred in relegating to the United States Bankruptcy Court for decision the question of whether or not an individual creditor of a member of a bankrupt partnership was entitled to be paid by preference to firm creditors out of the proceeds of the individual assets of such member, as the decision of that question was necessary, and a condition precedent to the proper determination of the main issue, which was whether the transfer assailed by the trustee of said bankrupt firm was a voidable preference or not.

"4. That the Court erred in rendering a decree and in entering a judgment herein in favor of the plaintiff William J. Sandoz, trustee of the bankrupt partnership of O. Guillory & Company, and against him, the said Alexander Miller, defendant." (Rec., p. 70.)

The word "own," found in the second of the assignment of errors, in line 6, as printed in the record, is a typographical error. It should be "owe" and not "own."

ARGUMENT.

Under the laws of the State of Louisiana the rules governing the distribution of the property of the partnership and that of the individuals composing it, between the creditors of the firm and those of the individual members,

are not the same as those established by paragraph *f* of Section 5 of the existing United States Bankruptcy Law. Under the former laws partnership creditors share equally with individual creditors in the assets of the estates of the individual partners, while the creditors of the individual members of the partnership do not thus share in the assets of the partnership estate with the partnership creditors.

This results from the following provisions of the Civil Code of said State. In Article 2823 it is provided:

> "The partnership property is liable to the creditors of the partnership in preference to those of the individual partner."

There is no corresponding provision in favor of the creditor of the individual partners, and as Article 3185 of said Code provides that "privilege can be claimed only for those debts to which it is expressly granted in this Code," the Supreme Court of Louisiana in the case of *Gueringer vs. His Creditors*, 33 An. 1279, very properly said at page 1282:

> "Partnership effects are privileged for the partnership debts. C. C. 2823; [*Skillman vs. Purnell et al.*] 3 L. 497; *Bernard, Syndic, etc., vs. Dufour*] 17 L. 596; [*Benjamin Poydras vs. W. Laurans et al.*] 6 An. 771.
>
> "It is well settled that partnership creditors share equally with individual creditors in the individual assets of the partners. C. C. 3185; [*Morgan vs. His Creditors*] 8 N. S. 599; [*Town vs. The Syndics of Morgan, Dorsey & Co.*] 2 L. 113; [*Bernard, Syndic, etc., vs. Dufour*] 17 L. 596; [*Flowers et al. vs. Their Crediiors*] 3 An. 189."

Therefore, assuming that the Supreme Court of Louisiana on rehearing correctly found the facts to be that the sale of the gin property and the payment of the $3,000 note were parts of the same transaction, there can be no question but that said Court's conclusion of law would be correct were the laws of Louisiana and not paragraph *f* of Section 5 of the United States Bankruptcy Law applicable. There is a direct conflict between the two. Under the former, as has already been shown, partnership creditors share equally with individual creditors in the individual assets, but individual creditors do not share with partnership creditors, while under the Federal law:

> "The net proceeds of the partnership shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

Under the Louisiana law the partnership creditors of the bankrupt firm were entitled to share equally in the assets of the partner Olivrel Guillory with his individual creditors, but under the Federal law they were not.

Under the latter law a payment made by a member of a bankrupt firm out of his individual assets to one of his individual creditors is not a voidable preference when the individual assets of such member exceed his individual liabilities, although he may be actually insolvent by reason of the bankruptcy of his firm and the insufficiency of its assets, together with the excess of those of the individual members over their individual liabilities to liquidate the partnership debts. When such member of such firm makes such payment, he does nothing more than that which he has a right to do, and no one can complain. It was never for one moment contended by the Supreme Court of Louisiana that O. Guillory's individual liabilities exceeded his individual assets. In the original opinion the Court said:

> "Guillory individually is not shown to have owed a dollar apart from the $3,000 note to his son-in-law Miller and the $6,000 mortgage assumed by the Haases." (Rec., p. 47.)

And in the opinion on rehearing:

> "It is argued, however, by counsel for Miller, that the partnership alone was adjudged a bankrupt, and not the members as individuals, and that as Miller, under the Bankrupt Act of 1898, is entitled to be paid by preference over partnership creditors out of the net proceeds of the individual estate of O. Guillory, plaintiffs were not prejudiced by the payment of the note held by Miller out of the individual assets of the debtor." (Record, p. 60.)

The Court does not gainsay the facts found by it in its original opinion as to Guillory's individual liabilities, nor does it controvert the correctness of the contentions of counsel for Miller, either in his statement of the facts or of the law, but holds that all rights of preference between the partnership creditors and the individual creditors of O. Guillory "must be determined by the Court having jurisdiction of the insolvency." The Court, however, does not abdicate jurisdiction of the controversy, but immediately proceeds to apply the law of Louisiana to the transaction between O. Guillory and Miller, and to set aside the payment of the $3,000 note made by the former to the latter as a voidable preference, and to give judgment against the latter in favor of the trustee of the bankrupt partnership for said amount. The Court seems to have proceeded upon the theory that the controversy as to whether the payment or transfer made by Guillory to Miller should be set aside as a preference or not, was to be decided by the law of Louisiana and the subsequent distribution of the fund by that of the United States. But this leads to absurd consequences. Under the law of Louisiana the transfer was a voidable preference. Under the law of the United States it was not a preference, but, on the contrary, a legitimate transaction. Therefore, the effect of the decree of the Louisiana Supreme Court would be to take from Miller the fund in controversy and hand it to the trustee, who would then be ordered by the United States Bankruptcy Court to hand it back to Miller,

a proceeding which would be about as effective in results as an attempt to empty a tank containing liquid by working a pump which discharged back into the tank.

The suit was originally filed by certain creditors of the partnership of O. Guillory & Company. Pending trial the partnership was adjudicated a voluntary bankrupt. Thereupon the trustee of the firm intervened and became a party plaintiff, with authority to prosecute the suit to final judgment for the benefit of the bankrupt estate. (Rec., pp. 9 and 10; 60.) The decree was in favor of the trustee. Therefore, from the time when the trustee intervened in the lower Court, down to the final decree of the Supreme Court, this was an action to set aside a preference by and on behalf of a trustee in bankruptcy, and the controversy should have been detemined by the United States Bankruptcy Law and not by the State law.

> United States Constitution, Art. 1, Sec. 8, paragraph 4; Art. 6, paragraph 2; *Sturges vs. Crowinshield*, 4 Wheat. 196; *Gibbons vs. Ogden*, 9 Wheat. 210, 211; *Sinnot et al. vs. Davenport et al.*, 22 How. 242, 243; *Escanaba Co. vs. Chicago*, 107 U. S. 683, and *Jacobson vs. Massachusetts*, 197 U. S. 25.

The facts as found by the Supreme Court of Louisiana are:

First. That O. Guillory sold certain real estate to plaintiff in error for $7,500, of which $4,500 was paid in cash and the balance of $3,000 was used to take up and pay a certain demand note for that amount which plaintiff in error then held against him.

SECOND. That, while O. Guillory was insolvent, by reason of the insolvency of the commercial copartnership of O. Guillory & Co., of which he was a member, his individual assets exceeded his individual liabilities.

The question for decision is: Was the payment of the note under the circumstances a preference? In paragraph *a* of Section 60 of the Bankruptcy Law, as amended by the Act of Congress of February 5, 1903, a preference is defined in part as follows:

> "A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the *same class*." (My italics.)

If this definition be considered in connection with paragraph *f* of Section 5 of said law, it will become at once apparent that the payment made to Miller, as aforesaid, was not a preference. The persons in the *same class* as Miller were the individual creditors of Guillory, the transferrer, and, since his individual assets were much greater than his individual liabilities, the effect of the transfer was not such as to enable Miller to obtain a greater percentage of his debt than other creditors of the *same class*. Miller, therefore, obtained no preference.

The Supreme Court of Louisiana erred in relegating to the Bankruptcy Court the matter of deciding whether, under the Bankruptcy Law, the transfer in question amounted to a preference or not.

By paragraph *b* of Section 60 of the Bankruptcy Law as amended, it is provided:

> "If a bankrupt shall have given a preference * * * it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any Court of bankruptcy, as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The issue of a preference *vel non* was tendered by the trustee to the State Court and not to the Bankruptcy Court. The former Court, therefore, had ample jurisdiction and power to determine the issue under the concluding clause of the paragraph of the law just quoted.

I submit, therefore, that the judgment and decree of the Supreme Court of Louisiana should be annulled, avoided and reversed, and that plaintiff in error should be quieted in his title to the property, the transfer of which has been assailed.

Jurisdiction.

Counsel for defendant in error has intimated that he would question the jurisdiction of this Court. The intimation could hardly have been seriously meant. However, I shall briefly consider the issue.

Section 709 of the United States Revised Statutes, as amended in 1875, provides in part as follows:

> "A final judgment or decree in any suit in the highest Court of a State, in which a decision in the

suit could be had, * * * where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, or commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

In *Armstrong vs. Treasurer of Athens County,* 16 Peters, 285, it is said:

> "In order to give this Court jurisdiction under the 25th Section of the Act of 1789, it must appear on the record itself to be one of the cases enumerated in that section, and nothing out of the record certified to this Court can be taken into consideration. This must be shown: * * * Third. When the proceeding is according to the law of Louisiana, by the statement of facts, and of the decision, as usually made in such cases by the Court."

In *Grand Gulf R. R. & Banking Co. et al. vs. Marshall,* 12 How. 167, the Court says:

> "The rule upon this subject is distinctly stated in the case of *Armstrong et al. vs. The Treasurer of Athens County,* 16 Pet. 285, where the Court said that, when the proceeding is under the law of Louisiana, it must be shown that the point arose and was decided, either by the statement of facts, and the decision as usually set out in such cases by the Court, or it must be entered on the record of the proceedings in the appellate Court (in cases where the record shows that such a point may have arisen and been decided) that it was in fact raised and decided."

In *Cousin vs. Blanc's Executor et al.*, 19 How. 207, the Court says:

> "The laws of Congress, and the acts of the officers executing them in perfecting titles to public lands, have been drawn in question and construed by the decision of the Supreme Court of Louisiana in this case; and the decision being against the title set up by Cousins, under the acts of Congress and the authority exercised under them, it follows that jurisdiction is vested in this Court by the 25th Section of the judiciary act to examine the judgment of the State Court; and, in doing so, we refer to the opinion of that Court, which is made part of the record by the laws of Louisiana, and is explanatory to the judgment of which it is there deemed an essential part. We refer to the opinion in order to show that questions did arise and were decided, as required, to give this Court jurisdiction. (9 How. 9.) This is necessarily so in cases brought here by writ of error to the courts of Louisiana, because no bill of exceptions is necessary there when appeals are prosecuted. The court of last resort acts on the law and facts as presented by the whole record.
>
> "By relying on this source of information as to what questions were raised and were decided by the State Court, we are relieved from all difficulty in this instance."

See, also, *Graham vs. Bayne*, 16 How. 61.

The foregoing cases all arose and were decided prior to the amendment of the 25th section of the Act of 1789, now Section 709 of the Revised Statutes, by the Acts of 1867 and 1875. Since the adoption of those amendments the rule which formerly applied to writs of error to the

Supreme Court of Louisiana only has been extended to the courts of the last resort in the other States of the Union.

> *San Jose Land and Water Co. vs San Jose Ranch Co.*, 189 U. S. 177, and cases cited on page 180; *Haire vs. Rice*, 204 U. S. 291; and see *Nutt vs. Knut*, 200 U. S. 12, 19; *Rector vs. City Deposit Bank Co.*, 200 U. S. 405, 411, 412.

Applying the provisions of the law and the decisions of this Court above cited to the facts of this case, there is no difficulty in arriving at the conclusion that a Federal question was raised by plaintiff in error and decided adversely to him. It appears from the opinions of the Supreme Court of Louisiana, rendered on the original hearing and on the rehearing, that the transfer assailed was a voidable preference under the laws of Louisiana, but not such under paragraph *f* of Section 5 of the United States Bankruptcy Law; that plaintiff in error invoked the Federal statute as a shield against the attack made upon the transfer, and the immunity set up and claimed under the Federal statute was denied to him. This brings the case squarely within the purview of Section 709 of U. S. Revised Statutes. On every point the case is with plaintiff in error. He is, therefore, entitled to the relief prayed for.

Respectfully submitted,

E. B. DUBUISSON,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

October Term, 1907.

No. 246.

Alexander Miller, Plaintiff in Error,
vs.
The New Orleans Acid and Fertilizer Co., The Canadian Mill and Elevator Co., The Morris McGraw Woodenware Co., and William J. Sandoz, Trustee in Bankruptcy of O. Guillory & Co.

In Error to the Supreme Court of the State of Louisiana.

Brief of N. O. Acid and Fertilizer Co. et als., Defendants in Error.

SYLLABUS.

1. This suit involves the right of creditors of insolvent debtors to set aside as a fraudulent preference a transfer of real estate by the insolvent to one

creditor in consideration of a pre-existing debt, under the provisions of Louisiana Civil Code, Arts. 1983, 1984. T. 5. See 117 La. Reps., 821.

2. After the suit was filed by certain creditors, the transferer and his firm were adjudicated bankrupts, and the trustee of the bankrupts intervened in the suit, prayed to be allowed to prosecute the same to judgment, and finally secured a decision against the plaintiff in error annulling the transfer to the extent of $3,000 under C. C. 1983-4. T. 62.

3. A writ of error to the Supreme Court of Louisiana was then sued out by the plaintiff in error, on the ground that the Court erred in holding that said transfer was a voidable preference under the State laws, and should have applied the provision of the Bankrupt Law to the effect that as the property transferred was individual property, partnership creditors could not complain. T. 69.

4. The writ should be dismissed for want of jurisdiction, because the asserted Federal question (the provisions of the

Bankrupt Law as to the right of individual creditors to be first paid out of individual assets) was not raised in the trial Court by any pleading or exception, nor was the question properly raised in the State Supreme Court. See Claasen vs. U. S., 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169, 2 Cyc., p. 661, quoting authorities.

5. The writ should be dismissed for want of jurisdiction for the further reason that "Where the highest Court of a state having jurisdiction of a subject decided a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question." Kennebec vs. Portland, 14 Wall. 23, 20 L. ed. 850; 142 U. S. 73.

6. The decision of a State Court as to what should be deemed a fraudulent conveyance by a bankrupt does not present any Federal question; nor does the application by the Court of the

evidence in reaching that decision raise one. McKenna vs. Simpson, 129 U. S., 511, 32 L. ed. 773.

7. The provisions of the Bankrupt Law can not be applied to a suit to set aside as fraudulent a conveyance by an insolvent to one of his creditors under the provisions of a State law, filed *three months prior* to the adjudication in bankruptcy. Cyc. 5. p. 346, note 58.

8. In Louisiana, creditors of an individual partner can only prorate equally with partnership creditors in assets of such partner. C. C. 2823, 3185.

—o—

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This cause originated in the Sixteenth Judicial District Court of the State of Louisiana, the petition having been filed on Feb. 2, 1905, wherein the plaintiffs in that suit (defendants in error) sought to secure judgment against O. Guillory & Co., a commercial partnership, for divers sums due them, and coupled with their demands for money judgments against this firm and the individuals composing it, a de-

mand against said firm and its members for the annulment of several transfers of real estate made by them in favor of different persons, the plaintiff in error, Alexander Miller, being one of the persons in whose favor a transfer was made, and who was made a party to the suit. The petition alleges the insolvency of the firm of O. Guillory & Co. and its members, and asserts that notwithstanding said facts, "the said firm and the individuals composing it have been fraudulently transferring, assigning or disposing of their property with the fraudulent intent to deprive their creditors of their recourse to same, or of defeating their rights in the same, and those of petitioners especially; or of giving an unfair preference to some of them; that this action on their part has resulted to the injury of their creditors, and petitioners especially, they as a firm and as individuals having but little property still in their possession or control, the same being insufficient to pay the debts still due by them, and particularly the amounts due petitioners." . . . "That in pursuance of said fraudulent intent, the said Olivrel Guillory, on the 7th day of December, 1904, by act before J. R. Pavy, Notary, executed in favor of his son-in-law, Alexander Miller, also a resident of the above parish, a simulated or fraudulent transfer of the following described property, for the simulated price of $7,500 cash, the said Miller

being in fraud and bad faith and well knowing the insolvent condition of the said Guillory, to-wit: The following lots of ground situated in the town of Eunice, La., with all the buildings and improvements thereon, including the gin-house situated on the same, and being lots 1, 2, 3, 4, 5 and 6 of Block 14, as per plat of said town . . . "

The petition, after setting forth the various other transactions between the Guillorys and other parties, alleges "that all of the above purported transactions are pure and simple simulations, and if not simulated, are fraudulent, prohibited by law, illegal, null and void, for the following reasons, viz: . . . 2d. That if said transactions be real, they are mere *dations en paiement*, in the form of sales, the real consideration not being a price in money, but transfers made to pay alleged or existing debts, due transferees in said acts, while the transferors were insolvent. 3d. That if said transactions be real, they were and are fraudulent to the knowledge of both parties thereto, and were made in bad faith, both parties intending to defraud petitioners and the other creditors thereby, and to secure a fraudulent and illegal preference to transferees over the other creditors and petitioners especially, as said O. Guillory & Co., and the individual members of said firm, were notoriously insolv-

ent at the time and since, to the knowledge of all of said parties. . . . ."

The prayer of the petition concludes: " . . . and that judgment be likewise rendered in petitioners' favor and against the said Alexander Miller, Joseph Aurelien Fontenot, John A. Haas, Samuel Haas and Francois E. Savoie, decreeing said alleged transfers simulated, and if not simulated, fraudulent, null and of no effect, and that the properties hereinbefore described be sold, and the proceeds be subjected to petitioners' debts and the judgments herein to be rendered by privilege and preference." See T. p. 6.

All parties defendants were duly cited; no exceptions, demurrers or objections were filed by Miller, and on Feb. 27, 1905, the following answer was filed in the case:

"Now into the Court come Alexandre Miller and Francois E. Savoie, defendants in the above numbered and entitled suit and for answer to plaintiff's petition deny all and singular the allegations therein contained.

"For further answer they aver that this cause is triable by a jury and that they desire to join their co-defendant, O. Guillory & Co., in praying for that mode of trial.

"Wherefore, the premises considered, respondents pray that this cause may be tried by a jury and that, after due hearing, plain-

tiffs' suit be dismissed at their costs and for general relief. (Sgd.) E. B. Dubuisson, Attorney for Respondents." See Tr. p. 8.

This application for a jurv being granted, (T. 8) necessarily retarded the progress of the trial, as no venire had then been drawn. On April 28, 1905, pending these proceedings, the firm of O. Guillory & Co., and the individual members thereof, were on their own petition, adjudged bankrupts, (T. 14, 15), and thereafter, on June 26, 1905, William J. Sandoz, alleging that he had been appointed Trustee of the bankrupt estate, was on his own motion made a party plaintiff to the suit and authorized to prosecute the same for the benefit of the creditors. T. 9. On July 7, the case was fixed for trial, at which time defendants waived the trial by jury, and same was heard on July 25, 1905. On July 29 the case was submitted without argument, (T. 29), and on the 31st judgment was rendered against O. Guillory & Co., and the individual members of said firm, *in solido*, for the respective amounts claimed by the plaintiffs, but decreeing that the sales or transfers attacked by them were neither simulated or fraudulent. T. 33-34.

From this judgment the Trustee of the Estate of O. Guillory & Co. applied for and was

granted an appeal to the Supreme Court of the State of Louisiana. T. 33, 36. An answer to the appeal was filed in behalf of other defendants, but Miller filed none. The Court on March 26, 1906, (T. 42-52), rendered an opinion and decree in the case annulling as simulated the transaction with Savoie, and affirming the judgment as to the other defendants, but on rehearing the Court amended their former decree, and decreed that the trustee also have judgment against Alexandre Miller, revoking and setting aside to the extent of $3000 the sale made to him by Olivrel Guillory, as a fraudulent preference, and further ordered that the property so conveyed be subjected to the judgment rendered in favor of said trustee. T. 58.

In passing upon the *argument* of Miller's counsel in the State Supreme Court (the point being made then for the first time)—quoting from the decision—that "the partnership alone was adjudged a bankrupt and not the members as individuals, and that as Miller, under the Bankrupt Act of 1898, is entitled to be paid by preference over partnership creditors out of the net proceeds of the individual estate of O. Guillory, plaintiffs were not prejudiced by the payment of the note held by Miller out of the individual assets of the debtor," the Court held that "the petition of the bankrupts shows that O. Guillory filed

schedules of his individual debts and of his individual property, and 'Where a firm goes into bankruptcy it is a proceeding against each and every member, and both the firm and individual assets must be administered in bankruptcy.' Collier on Bankruptcy, p. 60. Hence all rights of preference must be determined by the Court having jurisdiction of the insolvency." T. 61.

The Court then proceeded to "consider the transaction on its merits," and reached the conclusion that under the facts of the case, and the laws of the State of Louisiana governing the same, the sale to Miller should be annulled to the extent of $3000—the amount of a note due Miller by Guillory, and which the Court held to have been part of the consideration of the conveyance executed by the latter in favor of Miller—holding in effect that to that extent the transaction was void as a fraudulent preference. T. 61, 62.

"The finding of fact made in the Supreme Court of the State will be the basis of the decision of the Supreme Court." Taylor on Appellate Jurisdiction of Supreme Court, Sec. 249.

THE WRIT SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Your Honors will observe from this full statement of the history of this case, that Miller never raised this asserted Federal ques-

tion in relation to the bankruptcy law in any pleading whatsoever, and the record will be searched in vain for even a reference to this feature of the Act. No objection, exception or demurrer was filed by Miller at any stage of the case which raised this point on which his counsel now relies. The answer quoted in full above, does not mention such a question, and the judgment of the lower Court, written by the counsel for Miller himself, fails to refer to the point now so earnestly pressed upon this Court's attention. T. 33. The fact is, as the record and the brief of Miller's counsel in the State Supreme Court fully demonstrate, *the case was fought out with regard to the laws of this State applicable to the transaction*, and having lost the case on this basis, he now seeks to have this Court assume jurisdiction on the plea that a Federal question is involved and that its decision alone is necessary to the proper disposition of the case.

While it is true that in the printed *argument* of counsel filed in the State Supreme Court this question as to the provision of the bankruptcy law was referred to briefly, it was passed by almost unnoticed by counsel, and was the *very first time* that the question was raised in the case. And while the question was fully set forth in Miller's application for a rehearing in the State Supreme Court, it is well settled that a Federal question cannot be raised on

petition for rehearing. Taylor on Appellate Jurisdiction, Sec. 244.

It is well settled also that the Supreme Court will not pass on a Federal question not properly raised in the State Court. Taylor Sec. 248. And objections must be made in the *trial* court in order to reserve questions for review. 2 Cyc., p. 677, B.

In the case of Claasen vs. United States, 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169, this court held:

"Upon writ of error no error of law can be reviewed which *does not appear upon the record* or by *bill of exceptions* made part of the record."

Again:

"Subject to a few exceptions, which will be noticed hereafter, the rule is almost of universal application that *questions of whatever nature, not raised in the trial court* will not be noticed on appeal, and that, too, irrespective of any stipulations to the contrary which counsel may enter into." 2 Cyc, p. 661, quoting authorities.

This is the rule in Louisiana, as in other jurisdictions. See Holmgren vs. Werner, 51 La. Ann. 1476, 26 So. 384; Abat v. Michel, 1 Mart.

N. S., 240. See also 2 Cyc, pp. 662, 664, 669.

At p. 670 of this work, we find:

"One of the most important results of the rule that questions which are not raised in the court below cannot be reviewed in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, but that such party is *restricted* to the theory on which the case was prosecuted or defended in the court below." Quoting numerous authorities.

Again quoting from this work at p. 671:

"When a case is tried by both parties upon the theory that the law of the forum governs, a party cannot, on appeal, take the position that the laws of another state should have been applied." See also p. 676, g.

And for the same reason, where a case originating, as did the instant one, in a State Court, prior to the bankruptcy of the defendant; is based upon the provisions of the State law applicable to the transaction attacked; is tried and decided under that law, no reservation being made in any pleading whatsoever of any Federal question arising under the bankrupt law, the Federal question cannot be raised in the Supreme Court of the State; nor can it be

raised on application for a rehearing, or writ of error to the Supreme Court of the United States. Butler vs. Gage 138 U. S. 52; Clark v. Pennsylvania, 128 U. S. 395.

As stated previously in this brief, the Federal question was never raised by Miller's counsel until he came to argue the case before the State Supreme Court, so little stress being laid upon it even then that the Court did not notice it in deciding the case. T. 47, 48. After granting a rehearing of the cause to the Trustee as to the decision in Miller's case, however, his counsel pressed the question in his *brief*, but most of the argument was based on the provisions of the State law applicable to the transaction which was the subject-matter of the suit. (C. C. 1933; R. S. 1808.) And while it is true that the Court passed upon the effect of the provisions of the Bankruptcy Act in deciding whether the sale to Miller should be annulled, (T. 60), its decision on that point cannot be regarded as fully decisive of the issues of this suit. It practically held that if Miller had any right of preference in O. Guillory's individual assets, as claimed by him, that the forum for a decision of that question was the court before which the bankruptcy proceedings were then pending. This left the main issue undecided.

The Court then proceeded to decide the case under the provisions of the laws of Louisiana governing transactions of this character, where a firm and the individual members composing it, being insolvent, transfer their property to others in settlement, or part settlement, of a pre-existing debt. The Court found that O. Guillory had done that thing which the Civil Code of Louisiana (Art. 1983) says shall not be done, when he transferred a valuable property to his son-in-law, Miller, in part settlement of a note held by the latter. That article provides:

"But if such fraud consisted merely in the endeavor to obtain a preference over other creditors, for the securing of payment of a just debt, under circumstances in which by law the endeavor to obtain such preferences is declared to be a constructive fraud, in such case the party shall only lose the advantage endeavored to be secured by such contract." See also Art. 1984, C. C.

The sale to Miller was accordingly annulled to the extent of the consideration represented by the note. T. 61, 62.

Even adopting the contention of the plaintiff in error, the instant case is one where both a Federal and a non-Federal question are involved, and the Supreme Court of Louisiana

having decided adversely to the plaintiff in error under the State law, this Honorable Court will not assume jurisdiction. Taylor in his work entitled "Jurisprudence and Procedure of the United States Supreme Court," tersely states the law of the subject in Sec. 240:

"Where the highest Court of a state having jurisdiction of a subject decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question. Kennebec & P. R. Co. vs. Portland & K. R. Co.; 14 Wall. 23, 20 L. ed., 850; Hammond vs. Johnston, 142 U. S. 73, 35 L. ed., 941, 12 Sup. Ct. Rep. 724;" and numerous other authorities.

Again, this author, in treating of this subject, says, quoting from the same section:

"If the decision involves a Federal question and another question, and the decision of the latter is sufficient, notwithstanding the Federal question, to sustain the judgment, the Supreme Court will not review. When the Court finds it unnecessary to decide a Federal

question, and the State Court has based its decision on a local or state question, the writ of error should be dismissed. Eustis vs. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Harrison vs. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742. A judgment of a state court based on two distinct grounds, each of which is sufficient to sustain the judgment, and one of which involves no Federal question, cannot be reviewed on writ of error. Pierce vs. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Giles vs. Teasley, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359."

These liberal excerpts from this well-known book cover the case at bar so completely as to leave no room for doubt on the question of jurisdiction of this Honorable Court, and we feel satisfied that the Court will dismiss the writ for want of jurisdiction. But we have other citations of authority which seem to fit the instant case so well, and which touch on other phases of the question of the appellate jurisdiction of this Court, that we beg the Court's indulgence in order to present same. In the case of Armstrong vs. Athens, 16 Peters 284, 10 L. ed. 966, in passing on a question of jurisdiction, this Court said:

"The record must show that the question

was necessarily involved in the decision; and that the state court could not have given the judgment or decree, which they passed, without deciding it."

And in the case of Union Mut. Life Ins. Co. vs. Kirchoff, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260, this Court held:

"Unless the party claiming the Federal right plainly and distinctly sets up before the State Court that he intends to invoke for the protection of his rights the Constitution of United States, or some treaty, statute, etc., thereof, the Supreme Court is without authority to re-examine the final judgment of the State Court."

We respectfully maintain, as set forth at the outset of the argument in this brief, that the Federal question or right *was not set up before the State Courts* by any pleading or exception whatever, and that the question was not raised at all until Miller's counsel casually referred to same in his brief in the State Supreme Court.

But the writer is by no means sure that a Federal question has ever been raised by the application for a rehearing filled by Miller, for this Court held, in the case of McKenna vs.

Simpson, 129 U. S. 511, 32 L. ed. 773, 9 S. C. Rep. 365, that—

The decision of a state court as to what should be deemed a fraudulent conveyance by a bankrupt does not present any Federal question; nor does the application by the Court of the evidence in reaching that decision raise one.

In conclusion, we respectfully submit that the writ of error should be dismissed, first, because the asserted Federal question *was not raised in the trial Court* in any manner whatsoever, nor was such a question *properly raised* in the State Supreme Court; second, because the decision rendered by the Supreme Court of Louisiana decides not only the asserted Federal question, but also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment. See the decree, T. 62.

ON THE MERITS

Being firmly convinced that the writ of error sued out in this case should be dismissed by this Honorable Court for want of jurisdic-

tion, we hesitate to vex the Court with a further discussion of the facts, or with a presentation of the law applicable to the question raised by the writ. And it is only in the event the Court should conclude that it has jurisdiction of this case that we ask its consideration of the following pages of this brief.

As we understand the matter, the finding of the State Supreme Court on all questions of fact will be the basis of the decision of this Honorable Court, (see Quimby vs. Boyd, 128 U. S. 489); we will, therefore, adopt it as a starting point. Briefly stated, the Court found that O. Guillory, a member of the commercial firm of O. Guillory & Co., being insolvent, had transferred certain real property to his son-in-law, Miller, the plaintiff in error, on Dec. 7, 1904, for a stated consideration of $7,500; that Guillory was Miller's debtor on an overdue note of hand for $3,000, which note formed part of the sum representing the purchase price of the property; that Miller knew of the insolvent condition of his father-in-law, having been with him as a traveling companion for several hours previous to the sale, and only made up his mind to purchase at the end of that journey and immediately thereafter; that all these circumstances "tend to the conclusion that the transaction was an indirect preference of the son-in-law over other creditors by a disguised giving in payment." T.

61, 62. Accordingly, a decree was rendered annulling the transfer attacked to the extent of the amount represented by the note, in accordance with the provisions of Articles 1983 and 1984 of the Louisiana Civil Code.

Other facts ascertained from the record are: that the suit against Miller and the others to set aside as simulated or fraudulent the several transactions attacked by the creditors was filed on Feb. 2, 1905, in the State District Court (T. 6); that the firm of O. Guillory & Co. and the individuals composing same did not go into bankruptcy until April 28, 1905, the suit being still pending (T. 14); that the trustee of their estate in bankruptcy was made a party plaintiff in the said suit and authorized to prosecute the same to judgment for the benefit of the estate on June 26, 1905, (T. 10); and that no objection as to the right of the trustee to stand in judgment in the suit—or his capacity—were questioned. (T. 60, last par.)

This last quotation from the transcript is taken from the official opinion of the State Supreme Court in this case, and it seems to us is sufficient of itself to dispose of the contentions of the plaintiff in error, for his failure to object to the trustee's application to be made a party plaintiff,and especially his failure to peti-

tion for a removal of the cause to the Federal Court, should estop him from now setting up the defense upon which he relies. In the case of McKenna vs. Simpson, 129 U. S. 503, 32 L. ed. 771, this Honorable Court held:

An assignee in bankruptcy might bring suit in a United States court to set aside a conveyance made by the bankrupt to defraud his creditors; but where he resorted to the state court, and no question was there raised as to his power under the acts of Congress, or as to the rights vested in him as assignee, the Supreme Court has no jurisdiction to review the state decision.

Now, the petition for writ of error sets forth the claim that the "transfer was not a preference because Olivrel Guillory, the transferer, had no other individual creditors than petitioner, and because individual creditors of each member of a bankrupt partnership under paragraph f of section 5 of said United States bankruptcy law, are entitled to be paid by preference over partnership creditors out of the proceeds of the estate of such individual partner; that the judgment and decree of this Honorable Court in favor of the contention of the plaintiff trustee that the State laws governed and that said transfer was a voidable preference under those laws," was a mani-

fest error, etc., and "against the title, right, privilege and immunity specially set up and claimed by petitioner." (T. 69).

The above statement is faulty in several respects: first, the record will be searched in vain for proof to the effect that Guillory had no individual creditors save Miller; the reverse of the proposition, however, is shown by the record, for the notes which were the basis of the suits of the original plaintiffs are executed by the several members of the firm in their individual capacities. (See T. 6, 14).

Quoting from a leading case:

"Where an instrument is signed in the names of the individual members of a partnership and not in the firm name, the obligation is presumptively that of the individual members and not of the partnership itself." Cyc. 5, p. 416 quoting *in re* Roddin, 6 Biss. (U. S.) 377, 20 Fed. Cas. No. 11989, and numerous authorities.

Second, the State Supreme Court did not decide that individual creditors were not entitled to be paid by preference out of the proceeds of individual property of a bankrupt, but that this was a question for the court having jurisdiction of the insolvency to determine. (T. 61.)

Moreover, the Court will bear in mind that the transaction which is the basis of the proceedings here occurred on Dec. 7, 1904, nearly *five months before* O. Guillory & Co. and the individual members of said firm filed their petition to be adjudged bankrupts, and the suit against them and the plaintiff in error *to annul that sale* was filed almost *three months prior to the adjudication in bankruptcy.* We also crave the indulgence of the Court in order to again advert to the fact that the plaintiff in error never raised the point which he is pressing upon the Court's attention at any time or in any manner during the progress of the trial in the trial court; never asserted his claim that the provisions of the bankrupt act in favor of individual creditors set at naught the laws of Louisiana which declare that an insolvent debtor cannot give his property to his creditor in payment of a pre existing debt; nor did he make the plain or distinct claim that he intended to invoke for the protection of his rights the Constitution or laws of the United States, as he must have done to be entitled to relief here. 169 U. S. 103.

Thus it will be seen that the plaintiff in error is not only seeking to shield himself from the effect of the laws of his State on a transaction which occurred five months before the bankruptcy proceedings were instituted, but he has

waited until the Supreme Court of his State has decided against him under the provisions of the State's laws applicable to the transaction before invoking the aid of the Federal law.

Then, too, it is well to remind the Court that under the laws of Louisiana, "Creditors of an individual partner can only prorate equally with partnership creditors in the assets of such a partner." C. C. 2823, 3185; 33 A. 1279, Gueringer vs. His Creditors. So that even if the plaintiff in error was in fact the only individual creditor of O. Guillory at the time of the sale to him, all other creditors of the firm had an equal right with him in the individual assets of one of the members of the firm, for under the laws of Louisiana the individuals composing a commercial partnership are liable jointly and severally to the firm's creditors. C. C. 2872.

But the counsel for plaintiff in error will insist that it was error for the Supreme Court of Louisiana to have applied the laws of the state to the question as to whether the transaction between his client, Miller, and Guillory, was void as a preference; and that the sole test of the validity of this sale must be the provisions of the Bankrupt Act of 1898, wherein it is provided that individual creditors are entitled to be first paid out of individual assets. We

respectfully call the Court's attention to the fact, however, that this question involving the distribution of the funds of the bankrupts, or the validity of a sale, has *not arisen in the bankruptcy proceedings*, but *in a suit filed three months prior to the bankruptcy by creditors* of the firm of O. Guilory & Co., while the business was being conducted. We are, therefore, of the opinion that the provisions of the bankrupt law have no application to the case at bar; that whether this suit had been originally filed in the State or the Federal Court, it must have been decided according to the laws of Louisiana. See Cyc. 5, p. 346, note 53.

Quoting from this work, at the page just mentioned, under the sub-head, "Title Vests Regardless of the Time of Fraudulent Transfer," we find the following excerpt from the case entitled Matter of Gray, 47 N. Y. App. Div. 554, 62 N. Y. Suppl. 613, 3 Am. Bankr. Rep., 647, when the Court, in construing the provisions of sections 67e and 70e of the Bankruptcy Act of 1898, says:

"It will be observed that there is here no four months' limitation, and it is plain that the limitation which runs through the act in connection with frauds upon the system was at this point advisedly omitted. The purpose of the two sections is quite apparent. One covers frauds upon the act, whether actual or con-

structive, committed within four months; the other actual or common-law frauds exclusively, committed at any time. . . . When, however, the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred as a concomitant to the due operation of the system, but exclusively in the creditors' common-law right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided, he may avoid. Such as no creditor could have avoided, he cannot avoid."

Now, under the laws of the state of Louisiana, this transfer by an insolvent debtor to one of his creditors of a portion of his landed estate in payment of pre-existing debt, is a voidable preference, subject to annulment at the suit of any creditor. (C. C. 1983, 1984.)

Art. C. C. 1984 reads:

"Every contract shall be deemed to have been made in fraud of creditors, when the obligee knew that the obligor was in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor."

If this transaction should be maintained by the Court, it would have the effect of giving to Miller full pay for the debt due him, while the other creditors of the Guillorys would only receive a small portion of their claims. See T. 18 and Addenda, p. 2.

The suit filed against Miller, the plaintiff in error, was begun by creditors of the Guillorys, and was pending in the Court for three months before they went into bankruptcy, when the trustee of their estate intervened in the suit and carried it to judgment, securing a decree from the Supreme Court annulling the transfer to the extent of $3,000—the amount of the pre-existing debt which formed part of the consideration thereof.

We respectfully submit that this decision was correct, and should this Honorable Court assume jurisdiction of this cause, we pray that the decree of the Supreme Court of the State of Louisiana be affirmed, with costs.

Respectfully submitted,
WILLIAM J. SANDOZ,
G. L. DUPRE,
Attorneys for Defendants in Error.

argued.

MILLER *v.* NEW ORLEANS ACID & FERTILIZER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 32. Argued December 1, 1908.—Decided January 4, 1909.

Where the state court decides that a trustee in bankruptcy can avoid a preference under the state law against the contention that the exertion of such power conflicts with the bankrupt law, and that if the preference is given by a member of a firm that the trustee need not establish that there were other individual creditors, Federal questions are involved and necessarily decided, and the judgment does not rest on non-Federal grounds broad enough to sustain it and may be reviewed by this court under § 709, Rev. Stat.

Where no question is made below that the state court was not competent to authorize the trustee to prosecute, judgment in his favor will not be reversed when presumably the want of authority from the bankrupt court would have been supplied if challenged.

The authority to preserve liens of pending actions under subd. *f* of § 67 of the bankrupt law extends to causes of action under state law and is cumulative, and not in abrogation of rights under the state law.

Where, as in Louisiana, copartnership creditors coequally share with individual creditors in the individual estates of the members of the firm, copartnership creditors are prejudiced by preferences made by

a member to individual creditors, and, if the preference is illegal under state law, the trustee can succeed to a suit of the partnership creditor in the state court even if there be no other individual creditors; but the distribution of the preferential payment when paid in depends, as between the individual and copartnership creditors, on the provisions of § 5 of the bankrupt law.

THE facts are stated in the opinion.

Mr. E. B. Dubuisson, for plaintiff in error.

Mr. William J. Sandoz, with whom *Mr. G. L. Dupré* was on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The law of Louisiana considers the property of the debtor as the common pledge of all his creditors. C. C. 1969. As a general rule, therefore, it contemplates an equality of right in all creditors as to all the property of the debtor, existing at the time an obligation against the debtor arises, unless a creditor, as the result of some lawful contract or from the particular nature of the debt to which the law gives a preference, has acquired a higher and privileged right to payment than that which belongs to the general mass of creditors. C. C. 1968. Under that law the creditors of a partnership are preferred as to the partnership assets over the individual creditors of the members of the firm. C. C. 2823. This privilege does not, however, conversely exist, since it has been held from an early day in that State that individual creditors of members of the firm have no preference on the individual assets of the estate of the members of a firm, and therefore the partnership creditors and the individual creditors have a concurrent right to payment out of the individual estates. *Morgan* v. *Creditors*, 8 Martin (N. S.), 599; *Flower* v. *Creditors*, 3 La. Ann. 189.

As a result of the common pledge which all creditors are presumed to have upon the property of their debtors the law of Louisiana gives to every creditor an action to revoke any contract made in fraud of their common right of pledge. C.

C. 1970–1977. As a consequence it is permissible to attack, even collaterally, any mere fraudulent and simulated (that is, fictitious and unreal) transfer of his property by a debtor. See authorities collected in 2 Hennen's Digest, verbo Obligations VII, p. 1031. This right, however, even in case of bad faith, does not enable a creditor to avoid a real contract of a debtor unless the act has operated to the injury and prejudice of creditors who were such at the time the act sought to be revoked was done. C. C. 1937. Every contract, however, is deemed to have been in fraud of creditors and prejudicial to their rights "when the obligee knew that the obligor was in insolvent circumstances and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." C. C. 1984. From this rule are excepted sales of property or other contracts made in the usual course of business and all payments of a just debt in money. C. C. 1986. But this exception does not include the "giving in payment to one creditor to the prejudice of others any other thing than the sum of money due." C. C. 2658.

In 1903 the commercial firm of O. Guillory & Co., composed of Olivrel Guillory, Olivrel E. Guillory and Ambrois Lafleur, carried on business in the State of Louisiana. In 1904 the senior member, Olivrel Guillory, sold various parcels of real estate, which were his individual property, as follows: One sale to J. A. Fontenot, another to Alexandre Miller, and a third to John A. and Samuel Haas. All these sales were, apparently, on their face not susceptible of being assailed by creditors, because in form they were embraced within the excepted class to which we have referred.

On February 2, 1905, three corporations—which, for the sake of brevity, we shall designate as the Wooden Ware, the Fertilizing and the Elevator Companies—sued in a state district court the firm of O. Guillory & Co., the senior member, O. Guillory, individually, and the purchasers at the respective sales above mentioned. As to the first company, the cause of action was based upon an alleged open account for the purchase

price of goods sold to the firm prior to the making of the sales by the senior partner of his individual property above mentioned. As to the two other corporations the action was based upon notes held by the corporations signed by the individual members of the firm, and averred to have been given for the price of merchandise bought, also prior to said sales, from the corporations by the firm, it being alleged that the notes signed by the individual members had been received by the corporations as cumulative, and not in any wise as a novation of the firm obligation to pay the price of the goods by it bought. The sales were attacked as fraudulent simulations, or, if not unreal, as subject to be revoked, because they were made at a time when the firm was notoriously embarrassed or insolvent to the knowledge of the purchasers, and were not within the excepted class, because they were, in substance, not what they purported to be, but were givings in payment of the individual property of O. Guillory in order to prefer the purchasers.

The prayer was for a judgment for the amount of the debts, for a revocation of the sales, for a direction that they be sold by judicial decree to pay the judgments to be rendered, the payments to be made by preference out of the proceeds arising from the sale.

The cause was put at issue by general denials filed for the firm, for O. Guillory individually and for the purchasers. Before trial, in consequence of an adjudication in bankruptcy as to Guillory & Co., made on April 28, 1905, a petition was filed in the cause by W. J. Sandoz, alleging himself to be "the duly appointed and qualified trustee of the bankrupt estate of O. Guillory & Co." It was alleged that "since the institution of this suit the said O. Guillory & Co. have made application for and been adjudged bankrupts in the District Court of the United States for the Western District of Louisiana." And it was further averred that under the bankrupt law of the United States "the trustee succeeds to the rights of the creditors who may have brought actions to annul any transactions

affecting the property of the bankrupts, and the law makes it his duty to prosecute the same for the benefit of the said bankrupt estate in his capacity as trustee." The prayer of the petition was that Sandoz, as trustee, "be made a party plaintiff in this suit and duly authorized to prosecute the same to final judgment for the benefit of said bankrupt estate of O. Guillory & Co." The state court, after notice to the parties, entered an order substituting Sandoz as party plaintiff in his capacity "as trustee of the estate of O. Guillory & Co. . . . with authority to prosecute the same to final judgment for the benefit of said bankrupt estate."

Sandoz, trustee, was thereafter the sole plaintiff, and prosecuted an appeal to the Supreme Court to reverse a judgment of the trial court sustaining the sales. The Supreme Court, for reasons given in an elaborate opinion, held the sale to Fontenot to have been simulated and sustained the validity of the Haas and Miller sales. It was found that Olivrel Guillory had made the sales of his individual property principally for the purpose of assisting the firm which was embarrassed as the result of a decline in the price of cotton held by the firm; that at the time Guillory had no individual debts whatever, except one of three thousand dollars due to Miller and another of six thousand dollars, which was assumed and provided for in the Haas sale. Granting a rehearing asked by trustee Sandoz, a different conclusion was reached as to the Miller sale. The court found that when that sale was made Guillory owed Miller three thousand dollars, and although the price of seventy-five hundred dollars was actually paid to Guillory, yet as immediately after the sale Guillory had paid the three thousand dollar debt which he owed to Miller, "the transaction was an indirect preference of the son-in-law (Miller) over other creditors by a disguised giving in payment." This writ of error sued out by Miller was allowed by the chief justice of the state court.

By the assignments of error it is contended, first, that the court erred in testing, at the instance of Sandoz, trustee, the

validity of the sale to Miller by the state law instead of by the bankrupt law of the United States, which was alone controlling; second, under the bankrupt law of the United States the court erred in holding that the transfer by Guillory of his individual property to pay Miller, his individual creditor, was revocable, although there was no other individual creditor to be prejudiced thereby; and, third, that in any event the court erred in holding that prejudice could have resulted under the bankrupt law to individual creditors by the sale to Miller without ascertaining whether there were such creditors who could have been prejudiced. In other words, that the court erred in decreeing the sale to Miller to the extent of three thousand dollars to be revocable as a prejudicial preference, and at the same time relegating to the bankruptcy court the determination of whether there were any individual creditors who could have been prejudiced; thus decreeing a preference and yet declining to determine a question which was essential to be ascertained before a preference could be adjudged.

Our jurisdiction is challenged, first, because it is urged no Federal question was set up or claimed in the trial court, and therefore no such question was cognizable by the Supreme Court; second, because no Federal question was raised in or decided by the Supreme Court; third, even if incidentally a Federal question may have been passed upon below, nevertheless the court based its conclusions upon a non-Federal ground broad enough to sustain its judgment. The first question is involved in the second, because if the court below decided a Federal question we may not decline to review its action in so doing upon the assumption that the court transcended its powers under the state law by passing on a question which it had no right to examine because not raised in the trial court. The second contention embraces an irrelevant element, that is, that no Federal question was raised in the court below, since if such a question was expressly decided by the court our duty to review may likewise not be avoided by assuming that the court decided a question not raised in the cause.

The proposition, therefore, reduces itself to this: Did the court below expressly decide a Federal question adversely to the plaintiff in error?

In its opinion on the rehearing the court said:

"The trustee in bankruptcy, was, on his own petition, made a party plaintiff and was authorized by order of court to prosecute the suit to final judgment for the benefit of the bankrupt estate. Neither the capacity of the trustee nor his right to stand in judgment have been questioned. It is argued, however, by counsel for Miller that the partnership alone was adjudged a bankrupt and not the members as individuals, and that as Miller, under the bankrupt act of 1898, is entitled to be paid by preference over partnership creditors out of the net proceeds of the individual estate of O. Guillory, plaintiffs were not prejudiced by the payment of the note held by Miller out of the individual assets of the debtor. The answer to this contention is that the petition of the bankrupt shows that O. Guillory filed schedules of his individual debts and of his individual property. 'Where a firm goes into bankruptcy it is a proceeding against each and every member, and both the firm and individual assets must be administered in bankruptcy.' Collier on Bankruptcy, p. 60. Hence all rights of preference must be determined by the court having jurisdiction of the insolvency."

In view of the statement that no question was raised "as to the capacity of the trustee and his right to stand in judgment," and the fact that the record does not contain the full proceedings had in the bankruptcy court, and the further fact that no question as to the capacity of the trustee is raised in the assignment of errors, we take it that the intimation made by the court concerning the effect of the adjudication of a firm as being also an adjudication of the individual estates of the members was but a method of reasoning resorted to by the court to sustain its decision concerning the right of the trustee to avail of the state law under the circumstances of the case, irrespective of the rule as to preferences provided in the bank-

rupt law, and, further, to support its conclusion that it was its duty to abstain from determining whether there were individual creditors who were prejudiced, and to remit that question to the court in which the bankruptcy proceedings were pending.

But thus limiting the passage referred to it nevertheless results that the court below both considered and necessarily decided two distinct Federal questions: First, the right of the trustee to avoid a preference under the state law, although it was contended that the exertion of such power was in conflict with the bankrupt law; and, second, that the preference might be avoided under the state law at the instance of the trustee without establishing that there were creditors of the individual estate. So far as the third contention concerning jurisdiction it is apparent from what we have just said that it is without merit. While it is true that the court applied the state law in testing the existence of the preference, such application of that law is obviously not alone broad enough to sustain its conclusion that the trustee under the bankrupt law had the right to avail of the preference under the state law, and this is also true concerning the ruling that there was power to determine the preference under the state law without previously ascertaining the existence under the bankrupt act of individual creditors.

We come then to the merits. Eliminating, as we have done, the expressions of the court below, as to the effect of the adjudication in bankruptcy of the partnership upon the estates of the individual members, we need not approach the very grave question which would arise for consideration if that subject had been decided by the court below. *In re Stokes*, 106 Fed. Rep. 312; *Dickas* v. *Barnes*, 140 Fed. Rep. 849; *In re Bertenshaw*, 157 Fed. Rep. 363.

While § 5 of the bankrupt act expressly authorizes an adjudication in bankruptcy against a firm, the controlling provisions following are the direct antithesis of the rule prevailing in the State of Louisiana.

Thus, subdivision *f* of § 5 commands that "the net proceeds of the partnership property shall be appropriated to the pay-

ment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts." To enforce these provisions the act compels (sub. *d*) the keeping of separate accounts of the partnership property and of the property belonging to the individual partners; the payment (sub. *e*) of the bankrupt expenses as to the partnership and as to the individual property proportionately; and, permits (sub. *g*) the proof of the claim of the partnership estate against the individual estate, and *vice versa*, and directs the marshalling of the assets of the partnership estate and the individual estates, "so as to prevent preferences and secure the equitable distribution of the property of the several estates."

Now, by § 60 of the bankruptcy law, as amended by the act of 1903, it is provided that a person shall be deemed to have given a preference "if, being insolvent he has, within four months before the filing of the petition or after the filing of the petition, and before the adjudication . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." It is obvious that if at the time of the alleged preferential transfer to Miller there were no other creditors of the individual estate of Guillory than Miller under the rule laid down by the bankrupt act, the transfer to him of assets of the individual estate in payment of an individual debt did not constitute a preference. That it might have constituted a preference under the state law results from the difference in the classification made by the state law on the one hand and the bankruptcy law on the other. So, also, it is evident, having regard to the separation between the partnership and individual estates made by the bankrupt act and the method of distribution of those estates,

hat if there were no individual creditors and the sum paid to Miller was returned to the estate as a preference, it would be his right to at once receive back by way of distribution that which he was obliged to pay in upon the theory that it was a preference.

The questions then to be decided are these, 1st, Was the trustee authorized by the bankrupt law to avoid the sale to Miller to the extent of the three thousand dollars which constituted the giving in payment under the state law? And, if, so, was it incumbent on the trustee, under the bankrupt act, to such recovery to show the existence of individual creditors at the time the giving in payment to Miller took place who were prejudiced thereby, and if not was the trustee obliged to show the existence of individual creditors at the time of the adjudication in bankruptcy who would be prejudiced in the distribution of the bankrupt estate if the giving in payment to Miller was not annulled?

As the suit by the creditors was brought within four months before the adjudication in bankruptcy, their right to a lien or preference arising from the suit was annulled by the provisions of subdivision *f* of § 67 of the bankrupt law. But that section authorized the trustee, with the authority of the court, upon due notice, to preserve liens arising from pending suits for the benefit of the bankrupt estate, and to prosecute the suits to the end for the accomplishment of that purpose. *First National Bank* v. *Staake*, 202 U. S. 141. It is inferable that the parties proceeded upon the erroneous conception that the state court, where the suit was pending, was competent to authorize the trustee, but as no question on that subject was made below or is here raised, we may not reverse the judgment in favor of the trustee because of the absence of authority from the bankrupt court, when presumably the want of authority would have been supplied had its absence been challenged. Assuming, therefore, that the trustee was properly authorized, it follows that he was entitled to preserve and enforce the privilege or lien, which arose in favor of the cred-

itors, resulting from their pending action, even although the cause of action arose from the state law, and the application of that law was essential to secure the relief sought. To the accomplishment of this end the bankrupt law was cumulative and did not abrogate the state law. See *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356.

Undoubtedly, the trustee, in prosecuting the suit to judgment was obliged to prove the existence of the facts which were essential under the state law, since to hold otherwise would be but to decide that he could recover without proof of his right to do so. But as under the state law creditors of the partnership had a coequal right to payment with the individual creditors of a member of the firm out of his individual estate, it follows that even if there had been no individual creditor but Miller, recovery was justified because of the prejudice suffered by the partnership creditors as the result of the giving in payment made by Guillory to Miller. In view of the distinction between the estates of partnerships and the estates of the members of the firm, which is made by the bankrupt law, and the method of distribution for which that law provides, of course the trustee will hold the fund as an asset of the estate of the individual member, and primarily for the benefit of his creditors. Although, on proof of the claims against such individual estate, if it be that Miller is the only individual creditor he will be entitled, by way of distribution, to the full amount paid in by him because of the method of distribution ordained by the bankrupt law, that fact does not establish that there was a necessity, in order to avoid the preference under the state law, to make proof that at the time of the alleged giving in payment there were other individual creditors who were prejudiced. While the power in the state court to pass on the question of preference involved the duty of deciding whether, at the time of the assailed transaction there were creditors to be prejudiced, that duty did not involve ascertaining what creditors, at the time of the adjudication in bankruptcy, were entitled to participate in the distribution. The one was within the province

of the state court for the purpose of the case before it; the other was a different question, depending on independent considerations exclusively cognizable in the bankruptcy court. The state court was, therefore, right in so deciding.

Affirmed.